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In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 413.

FRANK W. MERRICK, JOHN W. HAARER AND GRANT FELLOWS,
Appellants,
vs.
N. W. HALSEY & COMPANY, ET AL., AND THE WEIS FIBRE CONTAINER CORPORATION,
Appellees.

BRIEF FOR APPELLANTS.

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vs.

N. W. HALSEY & COMPANY, ET AL., AND THE WEIS FIBRE CONTAINER CORPORATION,

Appellees.

BRIEF FOR APPELLANTS.

STATEMENT.

The appellees assailed the validity of Act number 46 of the Public Acts of 1915, entitled:

AN ACT to prevent fraud in the sale and disposition of stocks, bonds or other securities sold or offered for sale within the State of Michigan by any dealer, firm, company, association

or corporation, foreign or domestic, by requiring an inspection of such stocks, bonds, or other securities and an inspection of the business of such persons, firms, companies, associations or corporations, including dealers and agents, and such regulation and supervision of the business of said persons, firms, companies, associations, or corporations, including dealers and agents, as may be necessary to prevent fraud in the sale within the State, of any stocks, bonds or other securities, and to provide a penalty for the violation thereof, and to repeal act number one hundred forty-three of the Public Acts of nineteen hundred thirteen, approved May two, nineteen hundred thirteen, and all other acts or parts of acts inconsistent herewith.

For convenience we here reprint the Act in full:

[Act No. 46, P. A. 1915.]

The People of the State of Michigan enact:

SECTION 1. There is hereby created a commission to be known as the Michigan Securities Commission and hereafter called in this act "the commission," whose duty it shall be to administer and provide for the enforcement of all the provisions of this act. Said commission shall consist of the Commissioner of the State Banking Department who shall be president thereof; the State Treasurer of the State and the Attorney General of the State, all of whom shall be members of said commission during their respective terms of office and any two of whom shall constitute a quorum. The said commission shall succeed the Michigan securities commission created by act one hundred forty-three of the Public Acts of nineteen hundred thirteen, and as such successors shall receive all of the files, papers and property of said Michigan securities commission created by said act one hundred forty-three of the Public Acts of nineteen hundred thirteen. All

proceedings pending before said Michigan securities commission created by said act one hundred forty-three of the Public Acts of nineteen hundred thirteen shall be continued by the commission created by this act; all actions, civil and criminal, pending under said act one hundred forty-three of the Public Acts of nineteen hundred thirteen shall be continued and completed thereunder. Said commission shall have its office in the capitol in the city of Lansing, in rooms to be provided by the Board of State Auditors, and all of its records shall be there kept. It shall hold a regular meeting on the first Friday of each month and may hold special meetings upon the call of the president. It shall keep a complete record of all its meetings, its accounts and the business it transacts. It shall appoint a secretary whose salary shall not exceed the sum of twenty-five hundred dollars per annum and shall have power to employ such other and further assistance as may be necessary to carry out the provisions of this act. All salaries fixed by it shall be subject to the approval of the Board of State Auditors. It shall make such rules and regulations as may be necessary to carry out the provisions of this act and may prepare all necessary blanks to be used in its proceedings and in the conduct of its business.

Sec. 2. Every person, corporation, co-partnership, company, or association (except those exempt under the provisions of this act) organized, or which shall hereafter be organized in this State, whether incorporated or unincorporated, which shall either himself, themselves or itself, or by or through others, sell or negotiate for the sale of any stocks, bonds or other securities issued by him, them or it within the State of Michigan, shall be known for the purpose of this act as a domestic investment company. Every such person, corporation, co-partnership or association resident of or organized in any other state, territory or government, shall be known for the purposes of this act as a foreign investment company.

Sec. 3. The provisions of this act shall not apply to (a)

securities of the United States, or any foreign government, or of any state or territory thereof, or of any county, city, township, district or other public taxing subdivision of any state or territory of the United States, or of any foreign government; (b) unsecured commercial paper; (c) securities of public or quasi public corporations, the issue of which securities are regulated by the Michigan Railroad Commission or by a public service commission o rboard of equal authority of any state or territory of the United States or securities senior thereto; (d) securities of state or national banks or trust companies, or building and loan associations of this State (e) securities of any domestic corporation organized without capital stock and not for pecuniary gain, or exclusively for educational, benevolent, charitable or reformatory purposes; (f) mortgages upon real and personal property situated within this State where the entire mortgage is sold and transferred with the note or notes secured by such mortgages; (g) increase of stock sold and issued to stockholders, also stock dividends; (h) securities which are listed in any standard manual of information approved by said commission: *Provided, however*, That said commission shall have the power to call for additional and further information than that contained in such manuals with reference to any securities listed therein, and may, pending the filing of such information, suspend the sale of such securities, and also suspend, either temporarily or permanently, the sale of any securities listed in such manuals after a hearing upon notice to the issuer of such securities if said commission shall find that the sale of such securities would work a fraud upon the purchasers thereof; (i) all stocks, bonds and securities approved by the Michigan securities commission created by act one hundred forty-three of the Public Acts of nineteen hundred thirteen.

SEC. 4. Before selling, offering for sale, taking subscriptions for, or negotiating for the sale in any manner whatever in this State, any stocks, bonds or other securities of its own

issue, every investment company, domestic or foreign, shall file in the office of the commission a statement showing in full detail the plan upon which it proposes to transact business; a copy of all contracts, stocks, bonds or other instruments which it proposes to make with, or sell to, its contributors or customers, together with a copy of its prospectus, and of the proposed advertisements of its scale of stocks, bonds, or other securities which statement shall also show the name and location and main office of the investment company; the names and addresses of its officers, and an itemized account of its financial condition and the amount of its assets and liabilities, and such other information touching its conditions and affairs as the commission may require. If such investment company shall be a co-partnership or an unincorporated association it shall also file with the commission a copy of its articles of co-partnership or association, and all other papers pertaining to its organization. If it be a corporation organized under the laws of Michigan it shall also file with the commission a copy of its articles of incorporation, constitution and by-laws, and all other papers pertaining to its organization. If it shall be an investment company organized under the laws of any other state, territory or government, incorporated or unincorporated, it shall also file with the commission a copy of the laws of the state, territory or government under which it exists or is incorporated, and also a copy of its charter and the certificate of the proper officer of such state showing that it is authorized to transact business there; and also copies of its constitution and by-laws, and all amendments of any of the above mentioned instruments which have been made, and all other papers pertaining to its organization. It shall also pay a filing fee of one-tenth of one per cent upon the face value of the securitites for the sale of which application is made: *Provided, however,* That such filing fee shall not be more than one hundred dollars, nor less than ten dollars.

SEC. 5. All of the above described papers shall be verified by the oath of a member of the co-partnership or company, if it be a co-partnership or company, and by the oath of a duly authorized officer, if it be a corporation or an unincorporated association. All such papers, however, as are recorded or are on file in any public office shall be further certified by the officer of whose records or archives they form a part, as being correct copies of such records or archives.

SEC. 6. Every foreign investment company before offering for sale any of its stocks, bonds or other securities in this State shall also file its irrevocable written consent that suits and actions may be commenced against it in the proper court of any county in this State in which a cause of action may arise or in which the plaintiff may reside, by the service of any process or pleadings authorized by the laws of this State, on the Commissioner of the State Banking Department, said consent stipulating and agreeing that such service of such process or pleadings on such commissioner shall be taken and held in all courts to be as valid and binding as if due service had been made upon the company itself, and said instrument containing such consent shall be authenticated by the seal of said foreign investment company, and by the acknowledged signature of a member of the co-partnership or company, if it be a co-partnership or company, or by the acknowledged signature of the president and secretary of the incorporated or unincorporated association, if it be an incorporated or unincorporated association, and shall in such case be accompanied by a duly certified copy of the resolution of the board of directors, trustees or managers of the corporation or association, authorizing the secretary and president to execute the same. In case any process or pleadings mentioned in this act are served upon the Commissioner of the State Banking Department, it shall be by duplicate copies, one of which shall be filed in the office of the Michigan Securities Commission and another immediately forwarded by registered mail to the head

office of the person or corporation against which said process or pleadings are directed.

SEC. 7. Said application shall be heard by the said commission at the next regular meeting after said application is filed (providing such filing shall precede such monthly meeting by twenty-four hours), or at a special or adjourned meeting of said commission, but if such application is heard at a special or adjourned meeting of said commission the secretary shall give such applicant at least two days notice of such hearing. Said commission may have power to adjourn such hearings upon such applications from day to day or from time to time.

SEC. 8. The said commission shall have power to demand from any investment company seeking to come under the provisions of this act any further information other than such investment company is required to furnish under the provisions of this act which shall be necessary to the end that the commission may be put in possession of all facts and information necessary to qualify it to properly pass upon all questions that may come before it. It may make or have made under its direction a detailed examination of such investment company's property, a business and affairs, which examination shall be at the expense of such investment company. It may cause an appraisal to be made, at the expense of said investment company, of the property of said investment company, including the value of patents, good will, promotion and intangible assets, and it may fix the amount of stocks, bonds and securities that shall be issued by any corporation, foreign or domestic, in payment for property, patents, good will, promotion and intangible assets at the value it shall find the same to be worth and may require that such stocks and securities so issued for such property, patents, good will, promotion and intangible assets shall be deposited in escrow under such terms as said commission may prescribe. And said commission may withhold its license to sell such stocks, bonds and securities if such corporation has issued stocks,

bonds and securities in payment for property, patents, good will, promotion and intangible assets in excess of their value as found by said commission or if said stocks, bonds and securities are not deposited in escrow according to the terms fixed by such commission until such stocks, bonds and securities issued in payment for property, patents, good will, promotion and intangible assets in excess of the value so found by said commission have been surrendered to such corporation and cancelled by it, and until the said stock has been deposited in escrow under the terms prescribed by said commission.

SEC. 9. It shall be the duty of said commission to examine the statements and documents filed in its office by an investment company and the reports of any investigation conducted under the direction of said commission and to hear such applicant and it shall have power to examine under oath any person interested or connected with such investment company, and if said commission finds that the proposed plan of business of said investment company, or that its proposed contracts, stocks, bonds or other securities are fraudulent or are of such a nature that the sale of such contracts, stocks, bonds or other securities would in the opinion of said commission work a fraud upon the purchaser, then said commission shall disapprove the sale of such proposed contracts, stocks, bonds or other securities and shall notify such investment company by registered mail of its findings and disapproval, and it shall be unlawful for such company to do any business in the way of selling, offering for sale, taking subscriptions for, or negotiating for the sale in any manner whatever of any such contracts, stocks, bonds and other securities in this State; and said contracts, stocks, bonds and other securities shall not be sold in this State. If, however, said commission shall not find that the proposed plan of business of said investment company or that its proposed contracts, stocks, bonds or other securities are fraudulent or are

of such a nature that the sale of such contracts, stocks, bonds or other securities would in the opinion of said commission work a fraud upon the purchaser thereof, then it shall approve the sale of such stocks in the State of Michigan and issue its certificate in substantially the following language:

"This is to certify that the .....
has this date been given permission to sell $.....
of its ..... within the
stocks, bonds or securities.
State of Michigan. The Commission does not recommend the purchase of this security.
Dated.....
In Witness Whereof, I have hereunto affixed the corporate seal of the Michigan Securities Commission.
(SEAL) .....
Secretary."

The words "The commission does not recommend the purchase of this security" shall be printed in type two sizes larger than any other part of said certificate, and in case said certificate or the fact that said commission has approved said security is printed or published in any circular, pamphlet or newspaper, the words "The commission does not recommend the purchase of this security" shall be printed in type two sizes larger than the type in which the statement of fact that such security has been approved by said commission appears.

SEC. 10. Any person, firm, co-partnership, corporation or association whether domestic or foreign, not the issuer, who shall in this State sell or offer for sale any of the stocks, bonds or other securities issued by any foreign or domestic investment company, except the securities specifically exempted in this act, or who shall by advertisement or otherwise profess to engage in the business of selling or offering for sale such securities, shall be deemed to be a "dealer" in

such securities within the meaning of this act, and no dealer within the meaning of this act shall sell or offer for sale any such securities or profess the business of selling or offering for sale such securities unless and until he shall have filed a list of the same in the office of the Michigan Securities Commission as in this act provided. The term "dealer" shall not include an owner not issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature, nor one who in a trust capacity created by law lawfully sells any securities embraced within such trust.

SEC. 11. Any dealer desiring to sell or offer for sale within this State any stocks, bonds or other securities not exempted under the terms of this act, shall first register with the Michigan Securities Commission and shall furnish said commission, upon oath, in such form as the commission shall prescribe, the following information, to-wit: The dealer's name, residence and business address, the general character of the securities to be dealt in, the place or places where the business is to be conducted within this State, and where the business in this State is not to be conducted by the dealer in person, then the names and addresses of all the persons in charge thereof. Said dealer shall pay to the commission a fee of fifty dollars and shall furnish said commission with such other information in addition to that above specified as said commission shall deem necessary in order to thoroughly acquaint such commission with the character of the business of said dealer. All authorized agents of any dealer shall be registered with the commission and the name of any agent shall be stricken from the register by the commission upon the written request of the dealer and additional agents may be registered by the commission upon like request of the dealer: *Provided*, That no agent shall act as such until his name and address shall be registered with the commission. If the dealer shall be a non-resident of this State or a corporation

other than a domestic corporation, he shall at the time he registers with the commission, file with the commission a written duly authenticated appointment of the Commissioner of the State Banking Department of this State as his or its agent in Michigan upon whom process or pleadings may be served for and on behalf of the dealer, which appointment shall be irrevocable. Upon compliance by such dealer with the provisions of this act the said commission shall issue to such dealer a license under the seal of said commission and signed by the secretary thereof, which said license shall be good until revoked by said commission for good cause upon notice to such dealer and a hearing duly had: *Provided further,* That said commission shall issue the license provided for in this section to each dealer registered under act one hundred forty-three of the Public Acts of nineteen hundred thirteen upon the payment to said commission of the sum of one dollar, and shall also issue licenses under the terms of this act and upon the payment of the sum of twenty-five cents to such agents as were registered under the provisions of said act number one hundred forty-three of the Public Acts of nineteen hundred thirteen.

SEC. 12. In addition to the filing and examination fees herein provided for to be paid by investment companies and dealers, there shall be charged and collected by said commission a fee of three dollars for the registration and authorization of each agent of any such investment company or dealer and all the fees and charges collected by the commission shall be turned into the State Treasury and are hereby reappropriated to the commission towards paying the expenses of enforcing this act. The expenses of said commission shall not, however, be limited to the moneys received by it, but it shall have the power to incur all expenses it finds necessary in enforcing the provisions hereof.

SEC. 13. General accounts of every investment company, domestic or foreign, shall be kept in a businesslike, and in-

telligent manner and in sufficient detail that said commission can ascertain at any time its financial condition and the books of accounts shall at all times during business hours, except on Sundays and legal holidays, be open to stockholders and investors in said company, and the said commission, or its duly authorized representatives, and all such investment companies, shall be subject to examination by said commission or any member thereof or the clerks, accountants or examiners thereof, at any time said commission shall deem it advisable, and in the same manner as it is now provided for the examination of State banks, and such investment company shall pay a fee for each of such examination of not to exceed seven dollars fo reach day or fraction thereof that any member of said commission, clerk, accountant or examiner is absent from the capitol building for the purpose of making such examination and shall also pay the actual traveling and hotel expenses of the person or persons making such examination and the failure or refusal of any investment company to pay such fees, upon demand of such commission, clerk, accountant or examiner, while making such examination shall work a forfeiture of the right of such investment company to sell or offer for sale any of its contracts, stocks, bonds or other securities in this State. In case of a preliminary examination of any investment company by said commission for the purpose of the ascertainment by said commission as to whether said company shall be permitted to come under the provisions of this act, the fee for such examination shall be the same as in this section provided, and in case it shall be made to appear to the commission from the examination of said investment company after said investment company has been authorized to sell its stocks, bonds and securities that the further sale of said stocks, bonds and other securities would work a fraud upon the purchaser, then said commission may make an order revoking the license of said investment company to sell its stocks, bonds and securities upon notice duly given and a hearing duly had and may,

pending such hearing, suspend the right of said investment company to sell its stocks, bonds and securities.

SEC. 14. It shall be unlawful for any investment company or dealer, or representative thereof, either directly or indirectly, to sell or cause to be sold, offer for sale, take subscriptions for, or negotiate for the sale in any manner whatever in this State, any stocks, bonds or other securities (except as expressly exempted herein), unless and until said commission has approved thereof and issued its certificate in accordance with the provisions of this act, nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statements and papers required to be filed by virtue of the provisions of this act or the rules of the commission. It shall be unlawful for any investment company or dealer, or its or his agents, to issue, circulate or deliver any advertisement, pamphlet, circular, prospectus, or other document in regard to its stocks, bonds or other securities in the State of Michigan differing in any way from the copy filed with said commission as provided by this act. It shall be unlawful for any newspaper published in the State of Michigan to advertise the sale of any stocks, bonds or securities which have not been approved by said commission or which are not exempt under the provisions of this act.

SEC. 15. No dealer within the meaning of this act shall sell or offer for sale within this State any of the stocks, bonds or other securities of any investment company unless such investment company shall have fully complied with all the provisions of this act, nor until said dealer shall have registered with the commission, under the terms of this act: *Provided, however*, That should any dealer desire to sell or offer for sale within this State the stocks, bonds or other securities of an investment company, which has not itself complied with the provisions of this act, said dealer shall make application to the said commission for license as hereinbe-

fore provided for applications by investment companies and shall pay the same fee required to be paid by said investment company.

SEC. 16. All information obtained by the commission with reference to any securities and all records of the commission relating thereto shall be open to examination by the public, and it shall be the duty of the commission to preserve such information, and so classify, and arrange it as to facilitate examination. The commission may from time to time issue in pamphlet form, or by means of newspaper advertisements or otherwise, any and all information regarding any and all contracts, stocks, bonds or other securities sold or offered for sale within this State which it deems would be of public interest or advantage. All fees herein provided for shall be paid into the State Treasurer by the commission upon receipt thereof.

SEC. 17. Nothing in this act shall be construed to repeal or modify any laws giving the State Banking Department of this State control of and supervision over State banks and the business of banking in this State, nor shall any part of this act be construed to repeal or modify laws giving the Commissioner of Insurance of this State control of and supervision over the business of insurance in this State, and those engaged therein.

SEC. 18. The commission shall adopt a seal with the words "Michigan Securities Commission" and such design as the commission may prescribe, engraved thereon, by which it shall authenticate its proceedings. Copies of all records and papers in the office of the commission certified by the secretary thereof and authenticated by the seal of said Michigan Securities Commission shall be received in evidence in all courts equally and with like effect as the originals.

SEC. 19. Any person who shall knowingly or wilfully subscribe to or make or cause to be made any false statement or false entry in any book of any investment company, or who shall exhibit any false paper with the intention or for

the purpose of deceiving any person authorized to examine into the affairs of said investment company or shall make or publish any false statement of the financial condition of said investment company or false statement relating to the contracts, stocks, bonds, or other securities by it issued and offered for sale, shall be deemed guilty of a misdemeanor and shall be punished as hereinafter provided.

SEC. 20. The commission shall provide for the furnishing to those who may apply therefor, of any information regarding any investment company or its affairs, which is on file in its office, said commission to charge therefor approximately the cost of preparing such information. All fees collected under the provisions of this act shall be paid into the State treasury on the first day of each and every calendar month, and a complete record of all fees received shall be kept in the office of the commission, and all said fees so turned into the State treasury are hereby re-appropriated to the commission for the purpose of paying salaries and expenses necessary for carrying this act into effect. The members of the commission shall perform the duties imposed upon them and each of them, by the terms of this act, without other compensation than the salaries paid them by the State, but they shall be entitled to receive their actual expenses incurred when absent from the seat of government on business of the commission.

SEC. 21. Every investment company, domestic or foreign, shall file during the month of January in each and every year a detailed statement in such form and containing such information as the commission shall require showing its condition at the close of business on the preceding December thirty-first, and shall at the same time pay a filing fee therefor of one dollar.

SEC. 22. The supreme court upon petition of any person aggrieved may review by certiorari any final order of determination of the commission. The issuance of the writ shall not however, unless specifically ordered by the court, operate as a stay of proceedings.

SEC. 23. Any person or persons who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars or shall be imprisoned in the county jail for not more than one year, or both such fine and imprisonment in the discretion of the court.

SEC. 24. Should the courts of this State declare any section or provision of this act unconstitutional or unauthorized, or in conflict with any other section or provision of this act, then such decision shall affect only the section or provision so declared to be unconstitutional or unauthorized and shall not affect any other section or part of this act.

SEC. 25. Act one hundred forty-three of the Public Acts of nineteen hundred thirteen and all acts or parts of acts in conflict herewith are hereby repealed.

Approved April 9, 1915.

The appellees in case No. 131 in the court below and all of them dealers. N. W. Halsey & Company and the Continental & Commercial Trust & Savings Bank are Illinois Corporations; the appellees Arthur B. Leach, Ferry W. Leach and George G. Olmstead, are co-partners doing business under the firm name of A. B. Leach & Company. The appellees Henry L. Higginson, J. J. Storrow, Francis L. Higginson, Jr., George C. Lee, N. Penrose Hallowell, Hugh C. Levick, Daniel Shaw, James Sheldon, Francis W. Allen, are co-partners doing business under the firm name of Lee, Higginson & Company. Each and all of these appellees (plaintiffs in the court below) are non-residents of the State of Michigan. The appellee in case No. 132 in the court below, The Weis Fibre Container Corporation, is a non-resident corporation organized under the laws of South Dakota.

The appellant, Frank W. Merrick, is the Commissioner of Banking of the State of Michigan; the appellant, John W. Haarer, is the State Treasurer of the State of Michigan; and

the appellant, Grant Fellows, is the Attorney General of the State of Michigan, they, under the law, being the members of the Michigan Securities Commission created by said Act.

Numerous intervening petitions were filed both before and after the Order granting the injunction had been allowed. Each and all of the plaintiffs in the court below and the intervenors either are at the present time engaged in the sale of stocks, bonds and securities covered by the Act in question, or are desirous of engaging in such business in that State. Most of them are dealers within the provisions of the Act, while some of them, like the Weis Fibre Container Corporation, are issuers of stock within the provisions of the Act in question.

Plaintiffs in the Court below filed their bills to restrain the Commission from enforcing the provisions of the Act as against them upon the ground of its invalidity. The cases were consolidated and heard before Circuit Judge Denison and District Judges Tuttle and Sessions who held the Act invalid and restrained its enforcement against the plaintiffs and the intervenors.

The specific objections to the Act in question are numerous and cover several pages of the record. They may be summarized, however, and discussed under the following heads:

(1) That the title of the Act is defective and offends the provisions of Section 21 of Article V. of the Constitution of the State of Michigan.

(2) That the Act delegates legislative and judicial powers to the Commission and therefore offends Article IV. of the Constitution of the State of Michigan.

(3) That the Act in question does not provide due process and therefore offends the 14th amendment.

(4) That the exemptions found in Section 3 make the Act class legislation.

(5) That the Legislation is beyond the police power reserved in the State.

(6) That the Act offends the commerce clause of the Constitution in that it regulates and levies a direct burden upon interstate commerce.

The learned Judges who heard the motion for the temporary injunction held that the legislation was beyond the police power of the State and infringed the commerce clause of the Constitution and did not pass upon the other questions raised. We assume, however, that each and all of the objections made to the Act will be here urged, and we shall, therefore, discuss them under their respective heads.

ARGUMENT.

I.

TITLE OF ACT.

Scarcely an Act is assailed in the Michigan courts that it is not claimed that the Act offends Section 21 of Article V. of the State Constitution. The ground of defective title has probably been urged more frequently upon the State Court than any other provision of the State Constitution and there is a wealth of decisions on that subject.

Section 21 of Article V. the provision of the Constitution that is invoked in this connection, reads insofar as it is material here, as follows: "No law shall embrace more than one object which shall be expressed in its title." The purpose of this constitutional inhibition has been repeatedly declared by the Supreme Court of the State. In the comparatively early case of

People vs. Mahaney, 13 Mich. 481,

the court has under consideration a measure providing for the

establishment of a police government for the City of Detroit. Among other objections to the validity of the measure it was urged that it embraced more than one object in contravention of the constitutional requirement. Speaking through Mr. Justice Cooley, the court said, in part:

> "But it is insisted that the whole law is unconstitutional and void, because in violation of section twenty of Article IV of the constitution, which provides that 'no law shall embrace more than one object, which shall be expressed in its title.' The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the State. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it."

It would seem that this statement by Judge Cooley as to the purpose of the constitutional restriction in question constitutes a sufficient answer to the claim that Act 46 of 1915 embraces more than one object. Certain it is that the provisions of the measure were not brought together for the purposes suggested in the language above quoted, nor can it be said that "subjects diverse in their nature and having no necessary connection" have been incorporated therein. While it would undoubtedly have been competent for the legislature to have split up this Act into two or more measures, it is obvious, we believe, that it was patently undesirable so to do. The law-making body had before it a single proposition and it desired to adopt a single measure that should cover the entire subject-matter.

The object of the Act in question was clearly to prevent fraud in the sale of stocks, bonds and other securities and to regulate such sales with that end in view. The title of the Act clearly imports such purpose and those provisions which are germane to the general object sought to be attained are clearly within the title.

People vs. Brooks, 10 Mich. 98.

In this case it was said by Mr. Justice Montgomery (p. 100):

> "It is contended that the title expresses the purpose to protect fish, the purpose to protect persons engaged in fish culture, and the purpose to regulate fishings. It is perfectly evident from the title that the Act has only one general purpose, which is to regulate fishing. It is true that, included in the general purpose, is that of protecting those incidentally deriving benefit from such regulation. The Act does not infringe this constitutional provision."

It was said by the Court of last resort of the State, in

Attorney General vs. Weimer, 59 Mich. 580, 587;

"We do not think the Act in question obnoxious to Section 20 of Article IV. of the Constitution.

The object of this section is clearly and well stated by Mr. Justice Cooley, in the case of People v. Mahaney, 13 Mich. 494, which was to prevent 'the practice of bringing together into one bill subjects diverse in their nature and having no connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits.' It was not designed by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiply their numbers; but it was intended that in every case the proposed measure should stand upon its own merits, and that the Legislature should be fairly notified of its design when required to pass upon it."

In the case of

Russell vs. Heth, 98 Mich. 472;

It was said that an Act, the title of which was: "An Act to revise the laws authorizing the business of banking, and to establish a banking department for the supervision of such business," was an Act with a valid title, and that while the subjects covered by the Act might have been put in separate bills, it was unnecessary to its validity.

One of the earlier cases, that of

Kurtz vs. People, 33 Mich. 279-282

Has this question under consideration, and it was there said by Mr. Justice Campbell:

> "Nothing but our respect for what we understand to be the doubts of some judicial officers in regard to this statute, has induced us to deem it proper to do more than refer to the numerous cases heretofore decided on the meaning of the constitutional provision. It is a very wise and wholesome provision, intended to prevent legislators from being entrapped into the careless passage of bills on matters foreign to the obstensible purpose of the statute as entitled. But it is not designed to require the body of the bill to be a mere repetition of the title. *Neither is it intended to prevent including in the bill such means as are reasonably adapted to secure the object indicated by the title.* It would not be profitable to discuss those extreme cases where the adaptation of means to ends is so far-fetched and unnatural as to be directly and palpably misleading. The case presents, in our view, no such difficulties."

We wish to call attention particularly upon this matter to the case of

> Jewell Theatre Company v. State Fire Marshal, 178 Mich. 399;

Act 257 of the Public Acts of 1913 relative to the construction and operation of moving picture theatres was there involved. It was urged there, as here, that the Act had more than one object, that it sought on the one hand to prescribe requirements that must be observed by moving picture shows, and on the other, to enlarge the powers of a certain State officer. In disposing of the objection, the Court said, speaking through Mr. Justice Ostrander:

> "The Act in question embraces a single object which is expressed in its title * * * Its object is to save human lives and property by prescribing where and how moving picture shows shall be conducted. There is nothing in the Act which is not calculated to accomplish its object, nothing which is not germane to the legislative purpose expressed and suggested in the title."

We believe that this language is particularly in point in the case at bar. There, as here, the legislature sought to cover the subject-matter of a specific proposition before it by the provisions of a single enactment.

We wish to call the attention of the Court also to the following decisions:

> City of Detroit v. Railway Co., 63 Mich. 712;
> Attorney General v. Supervisors, 71 Mich. 16, 22;
> Toll v. Jerome, 101 Mich. 468, 471;
> Grimm v. Secretary of State, 137 Mich. 138;
> Reed v. Auditor General, 156 Mich. 208.

We therefore submit that the law is not subject to the objection that it offends Section 21 of Article V. of the Constitution of the State of Michigan, but that each and every provision of the Act is germane to the object expressed in the title.

II.

DELEGATION OF LEGISLATIVE AND JUDICIAL POWER.

The Michigan Constitution contains the usual provision on the division of the powers of government. Article IV. of the Constitution of that State provides as follows:

> "Section 1. The powers of government are divided into three departments: The legislative, executive and judicial.
>
> Sec. 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution."

It was urged in the Court below, and undoubtedly will be here, that this Article of the State Constitution is infringed by the creation of the Michigan Securities Commission, the granting to that Commission of the right to make rules and regulations, and the conferring upon that Commission power to determine, upon inspection and investigation, whether the proposed issue of stocks, bonds or securities are of fraudulent character. The Act in question directs the Commission to disapprove the sale of securities if they are fraudulent or their sale would work a fraud upon the purchaser. In other words, the Commission from its investigation is to determine the fact as to whether such securities are, or are not, of a fraudulent character and upon the determination of that fact rests the operation of the law. If they are fraudulent the law prohibits their sale and directs the Commission to disapprove them; if they are not fraudulent the law permits their sale and directs the Commission to approve their sale. This is not a delegation of legislative power nor the delegation of judicial power. It is creating a Commission to find the facts and then upon the finding of fact the law operates. As was well said, in

Lockes Appeal, 72 Penn. State 491, 498,

> "Then the true distinction I concede is this: The legislature can not delegate its power to make a law but it can make a law to delegate a power to determine

> some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government."

The objection was made in the Court below that no fixed standard for the guidance of the Commission was found in the law. How absolutely impossible such a thing would be must be apparent, and how readily the law could be evaded if a fixed standard was present in the Act goes without saying. The varying and changing schemes of fraud are as numerous and as varied as the operation of different minds can make them. As was said by this Court speaking through Mr. Justice McKenna, in

> Miller vs. Strahl, 239 U. S. 426,

in construing an ordinance requiring inn-keepers in case of fier "to do all in their power to save such guests and inmates:"

> "Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary."

See also

> Nash vs. United States, 229 U. S. 373;
> Jasnowski vs. Connelly Judge, 158 N. W. R. 229.

It is too late in the day to insist that the power given to administrative boards, commissions and officers to determine question of fact and to make proper administrative rules is the delegation of legislative and judicial power. Practically every new Board that has been created with power to determine facts has been assailed upon these grounds and the courts with unanimity have declined to sustain their conten-

tions. It will be unnecessary, as we view it, to cite all, or any considerable number of these cases.

Union Bridge Company vs. United States, 204 U. S. 364;

may be regarded as typical of the cases where an administrative officer is authorized to determine the fact as a basis of administrative action. In this case the Court had under consideration the provisions of the River and Harbor Act of 1899, which provided for the removal or alteration of bridges which unreasonably obstructed navigation. The Secretary of War was given the power to determine the fact as to whether such bridges were an obstruction to navigation after giving the parties an opportunity to be heard. It will therefore be seen that upon the finding of the Secretary of War that a bridge was an obstruction to navigation the bridge company would be required to remove such obstruction and would therefore be damaged in many instances to a very large amount, and it was urged that the power to regulate commerce was one of the powers surrendered to Congress by the states and that commerce included, navigation, and that therefore Congress alone could make the determination and could not impose upon an executive officer the duty of ascertaining in what particular cases the obstruction to navigation occurred because there would be a delegation of legislative and judicial power. The court declined to follow such contention but held that the Secretary of War in determining the fact was acting in an administrative capacity and was performing neither legislative nor judicial functions. The early case of the

Railroad Commission Cases, 116 U. S. 307,

which involved the validity of the Mississippi Railroad Com-

mission Act, fully discusses and considers this objection. In addition to those authorities we might cite

Oregon R. & M. vs. Campbell, 173 Fed. 957;
Hubbel vs. Higgins, 148 Ia. 36;
State vs. Railway Co., 76 Kan. 467;

and the following Michigan cases:

Kennedy vs. State Board of Registration, 145 Mich. 241;
Michigan Central R. R. Co. vs. Railroad Commission, 160 Mich. 355;
Feek vs. Township Board of Bloomingdale, 82 Mich. 393;
Sherlock vs. Stewart, 92 Mich. 193.

The last cited case involves the question as to the power of the State to delegate to a municipality the determination of the question as to whether a party was a suitable party to conduct a saloon in the City of Grand Rapids. It was said by the Court at page 198:

> "Under this comprehensive police power of the State it is, in my judgment, too clear for argument that the legislature may confer upon municipalities the right to determine the places where saloons may be kept, and to determine that question upon each application. The legislature may also enact that only reputable persons shall be allowed in the business, and may authorize the municipalities to determine the question of fitness. If the State possesses this right, the power to determine these questions must, in the first instance, be lodged in the municipality, or board representing it, or in some other body or court. There is no presump-

tion that the persons charged with this duty will not perform it, or that they will abuse the discretion given them."

It was said by Mr. Justice McKenna, speaking for the Court, in

Grand Trunk Ry. Co. vs. Michigan Railroad Commission, 231 U. S. 457, 465:

"It is too late in the day to question the competency of a State to create a Commission and to give it the power of regulating railroads and necessarily of investigating the conditions upon which regulation may be directed. If a judicial interference is sought with the exercise of such power it must be clearly shown to have been transcended, not left as a conclusion from the balancing of conflicting affidavits, or even, it may be, as held by the District Court, on ex parte affidavits. Courts are reluctant to interfere with the laws of a State or with the tribunals constituted to enforce them. Doubts will not be resolved against the law, nor the decisions of its tribunals prevented or anticipated unless the necessity for either be demonstrated. Upon these principles the District Court acted, and rightly acted."

The power is given the Commission to determine the question as to whether the issue submitted to it is a fraudulent issue and directs the Commission to approve of such issue unless it finds such fraud. This is the delegation to an administrative board of the power to determine the question of fact whether the issue is fraudulent or not. This is not the delegation of judicial power but is creating a Commission which is given the power of finding the fact, and under such

circumstances it is not a delegation of legislative or judicial power. In the cases cited it has been held that railroad commissions could determine a reasonable rate with no fixed standard. There can be no fixed standard. A wide discretion must be left in the administrative body and permission given to a railroad commission to fix a reasonable rate is as free from a fixed standard as is the power given to the Securities Commission to determine the question of fraud. The only other power given to the Commission which is subject to the same consideration, in part at least, is the power given to the Commission to fix the value of the property, both tangible and intangible, and therefore the amount of stock that may be issued by *corporations* for such property and to require the escrow of promotion stock in corporations; but the State has the right to regulate the manner in which and the conditions under which corporations shall do business in the State. See

Paul vs. Virginia, 8 Wall. 168;
State vs. Stone, 118 Mo. 388;
Continental Company vs. Hattabaugh, 121 Pac. 81;
Railroad vs. Gibbs, 142 U. S. 386.

This doctrine is so well established that it is unnecessary to cite further authorities; but in addition to the inherent right of the State to prescribe the terms and conditions under which corporations shall do business is the fact that it is well known that water in the stocks is put in by the promotor, not the public. A patent of no actual value may be turned in for a large amount of stock. Unless there is some restraint promotion fees and expenses may be put in at any amount. Options on real estate may be capitalized in corporations far beyond their actual worth. The State should limit the amount of stock issued for these purposes as a matter of common honesty; and it is highly proper that the amount to be issued

for these purposes should be fixed by an indifferent tribunal rather than by the promoters themselves.

Experience has shown that the promoters are usually officers in the company and unless restrained from selling their promotion or bonus stock they can readily sell such stock to the man who believes that his money is going into the treasury of the corporation, dispose of their holdings, leave the company without a dollar to do business on, and deprive both company and investors of their money, thus working a fraud on both. Such transactions are very frequent in companies with watered stock and the wisdom of this provision cannot be questioned by any one familiar with corporate financeering; but it is not necessary for us to determine the wisdom of it, the terms and conditions under which a corporation may do business in Michigan is subject to the will of its creator, namely, the State.

There is no force in the contention that there is by this Act any delegation of legislative or judicial functions.

III.

DUE PROCESS.

Section 1 of the Act in question requires the Commission to meet on the first Friday of each month; Section 7 provides for a hearing of the applications that have been filed twenty-four hours before such meeting; Rule 22 of the Commission provides for regular meetings of the Commission each Friday (R. 96), while Section 7 and Rule 22 (R. 96) provide for special meetings at the call of the Chairman. Section 7 provides for two days' notice to applicants of a hearing at a special or adjourned meeting. Section 22 of the Act provides for a review of the proceedings of the Commission by the Supreme Court on writ of certiorari.

We have challenged the attention to these provisions for the

purpose of demonstrating that the Act itself does provide due process. The infirmity in the holding in the Court below, as we view it, lies in the fact that the Court below based its decision upon the erroneous assumption that the law in question is prohibitive because of the fact that the right to sell a given stock to the public is temporarily suspended pending an investigation by the Commission. In this view we respectfully submit the Court was in error and this error permeated the decision. In all regulatory and licensing statutes there must be a temporary suspension of the right to do business until the inspection and investigation is had and the license obtained.

The right to follow any avocation and to conduct any business which is subject to regulation under the police power of the State may be temporarily suspended pending investigation and until the license to do business has been obtained. The right to practice law is so suspended in the State of Michigan as is the right to practice medicine, to practice dentistry, to follow the avocation of barber, horseshoer and many other avocations, all of which are honorable. The right to use public highways is subject to regulation and in practically every State of the Union a license to drive an automobile must be first obtained before the right can be exercised. None of these requirements have ever been deemed to make the law prohibitive and to deprive it of its regulatory character. In other words, the temporary suspension of the right pending investigation, or until the license may be issued, is not a deprivation of that right within the meaning of the 14th amendment.

A law prohibiting the sale of all stocks, bonds and securities would be bad, but this law restricting the sale pending investigation as to their fraudulent character we respectfully submit is good. This distinction was recognized by this Court in the decisions on the Bulk-Sales Act and was clearly pointed out by the State Supreme Court in its first decision involving that Act in

Spurr vs. Travis, 145 Mich. 721, 724.

The Bulk-Sales Act of Michigan in common with other Bulk-Sales Acts required parties selling their stock in bulk to give five days notice to their creditors. The Act was designed to prevent fraud. It was urged that the Act restricting the sale for this five days period was in conflict with the State Constitution whose provision is similar to the 14th amendment. The State Court, however, said:

> "Does the Act conflict with section 32 of Article VI. of the Constitution? It may be conceded that an Act which should prohibit the sale of property of any character, either generally or for a stated time, without any adequate purpose or object, would constitute such an interference with the property and liberty of the individual as is inhibited by this section. The courts have, however, never treated this or similar provisions as prohibitive of legislation in the exercise of the police power which regulates the manner of the use or disposition of property, even though a temporary inconvenience may be suffered by the owner. An illustration of this is afforded by the law providing liens in favor of mechanics. Many other illustrations might be given, but it is, we think, safe to state, as a general rule, that where, in the exercise of the police power, a beneficial result is sought, and legislation is enacted in protection such legislation does not infringe the liberty of the citizen in a legal sense or deprive him of property because it involves regulations which may postpone for a reasonable time the exercise of his right to sell."

The Michigan Bulk-Sales Act was sustained by this Court in

> Kidd, Dater and Price Co. vs. Musselman Grocer Co., 217 U. S. 461.

We quote the syllabus in this case:

> "It is within the police power of the State to require tradesmen making sales in bulk of their stock in trade to give notice to their creditors and also to prescribe how such notice shall be given, and unless the provisions as to such notice are unreasonable and arbitrary a statute to that effect does not amount to a deprivation of property, abridge liberty of contract or deny equal protection of the law within the meaning of the Fourteenth Amendment; nor is the requirement in the Michigan Sales-in-Bulk Act of 1905 that such notice be either personal or by registered mail unreasonable or arbitrary."

See also

Lemieux vs. Young, 211 U. S. 489.

Upon this same proposition we call the attention of the Court to the case of

Reetz vs. Michigan, 188 U. S. 505.

This case had under consideration the Act creating the Medical Board of the State of Michigan and providing for an examination of applicants who desired to follow the profession of physicians and surgeons in the State of Michigan. The Act by its terms did not provide for notice to applicants but did provide for semi-annual meetings at specified times at the State Capitol. The Act under assault here provides for monthly meetings. The Act under consideration in the Reetz case did not provide specifically for any review of the proceedings of the Medical Board. The Act here assailed does specifically provide for a review of the proceedings of the Commission upon writ of certiorari. It was said by this Court in the Reetz case: (P. 508)

"Neither is the right of appeal essential to due process of law. In nearly every State are statutes giving, in criminal cases of a minor nature, a single trial, without any right of review. For nearly a century trials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court. In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted.

In Pittsburg, etc., Railway Company vs. Backus, 154 U. S. 421, upon the question whether the right of appeal was essential to the validity of a taxing statute, we said (p. 427):

'Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the State Board, while only the one hearing before the latter Board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so.'

In McKane vs. Durston, 153 U. S. 684, 687, this court declared that a 'review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not a necessary element of due process of law.'

See also

Andrews vs. Swartz, 156 U. S. 272.

But while the statute makes in terms no provision for

a review of the proceedings of the Board, yet it is not true that such proceedings are beyond investigation in the courts. In Metcalf vs. State Board of Registration, 123 Mich. 661, an application for mandamus to compel this Board to register the petitioner was entertained, and although the application was denied, yet the denial was based not upon a want of jurisdiction in the court but upon the merits.

It is further insisted that it is essential to a judicial or quasi-judicial proceeding that it should give a person accused or interested the benefit of a hearing and that there is in this statute no special provision for notice, or hearing, or authority to summon witnesses or to compel them to testify. The statute provides for semi-annual meetings at specified times at the State Capitol, but the plaintiff in error did not appear at any of these meetings or there present an application for registration or showing of his right thereto; he simply sent to the secretary of the Board a certified copy of his registration under the prior statute, and his diploma from the Independent Medical College of Chicago, Illinois. The latter was returned with a notice from the Board that it had denied the application for registration. When a statute fixes the time and place of meeting of any Board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice. If plaintiff in error had applied at any meeting for a hearing the board would have been compelled to grant it, and if on such hearing his offer of or demand for testimony had been refused, the question might have been fairly presented to the State courts to what extent the action of the Board had deprived him of his rights."

In

St. Louis, I. M. & S. Ry. Co. vs. State, 136 S. W. 938.

The Railroad Commission Act of the State of Arkansas was under consideration, and it was urged that the Act was invalid because appellant was deprived of a right of a trial by jury, and it was there said:

> "Appellant contends, however, that it was deprived of a constitutional right by the court refusing to submit the matter to trial by jury upon its demand. No provision is made in the law creating the Railroad Commission and prescribing its powers and duties, nor in the Act of 1907, under which the order for the violation of which appellant was indicted was made by it, expressly or by implication for the trial or review of its acts and orders by a jury on question of fact.

In

> Kirkland vs. State, 72 Ark. 78 S. W. 772 (65 L. R. A. 76, 105 Am. St. Rep. 25),

the Court said:

> "It is true that the Constitution provides that 'the right of trial by jury shall remain inviolate' (article 2, 7); and that no person shall 'be deprived of life, liberty or property without due process of law' (article, Sec. 8); but it is well settled that it is only to cases at common law in which the issues of fact were triable by jury, and perhaps such as are of similar analogous nature, that the guaranty relied upon by the appellants extends. A jury trial is not necessary to constitute due process of law in every case.' (Citing authorities.) The question as to whether or not said order was unreasonable and arbitrary was one of law for the court; it never having been intended that a

jury should pass upon, as a question of fact, whether the exercise of power by the Legislature or by the Railroad Commission under legislative enactment was unreasonable and arbitrary. (Citing authorities.)

We also call attention to the case of

Michigan Central R. R. vs. Powers, 201 U. S. 245, 301;

At the last cited page it was said:

"While there may be no provision for an equalization of railroad with other property it will be perceived that the statute names the time and place for the session of the assessing Board, gives to any person or company interested the right to be heard, and also authorizes the Board to correct the valuation. So that it can not be objected that the railroad companies are precluded from a full hearing in the matter of valuation and, as has heretofore been said by this court, *one hearing is sufficient to constitute due process.*"

See also upon this subject:

Railroad Commissioners vs. Railroad Company, 82 S. C. 418;
Wadley So. Ry. Co. vs. State, 137 Ga. 497;
Paulsen vs. Portland, 149 U. S. 30.

It is provided by the Act in question that non-resident dealers and investment companies who desire to do business in the State of Michigan shall file consent to service of process upon the State Banking Commissioner. This is a reasonable regulation. A provision of the New Jersey Automobile Act

which required non-residents using the highways of that State to file consent to service was assailed in the case of

Cleary vs. Johnston, 74 Atl. 538, 541.

It was there said by the Court:

> "Assuming that the right to use the highways belongs to such non-resident owner, yet it is obviously not an absolute right. The stringent legislative restrictions upon the use of the highways by automobiles —which restrictions have received judicial approval— exhibit the fact that the automobile is regarded as a dangerous engine, if used otherwise than under the control provided for by the Legislature. It is apparent that these restrictions upon the manner in which highways shall be used by automobiles can only be made effective by penalties, and the penalties can only be enforced by reaching the owners of such machines. A provision for impounding the machine itself would be valid, but while valid, would be ineffacious, because the speed of the automobile is such that in most instances the machine itself would escape arrest. Resident owners can be reached by service of process within this state, while non-resident owners of course, unless by voluntary appearance, are immune from service. Thus while legal proceedings to enforce the penalties for violating the automobile law can be taken in the courts of this State as against residents, yet, as to non-residents, in the absence of a provision like the one in question, such enforcement would mean numerous suits in other States in the Union from New York to California, or perhaps in other continents. In view of the present need of a vigorous enforcement of these laws for the protection of all other users of the high-

ways, I am of the opinion that the condition imposed that a man who proposes to use our highways for motoring shall agree to submit himself to the courts of the State into which he comes, so far as concerns matters growing out of such use, is neither unconstitutional nor unreasonable. In respect to the point that this burden is imposed upon non-residents and not upon residents, and so unconstitutional inequality is created, it is sufficient to say that both residents and non-residents are placed upon the same footing. Both are made amenable to the laws of the State whose highways they are using."

IV.

CLASSIFICATION.

It will undoubtedly be urged that the legislation in question is defective because of the classification. This objection is based upon the exemptions which are found in Section 3 of the Act. It should be said at the onset that unless the Court can say clearly and without doubt that there is no reasonable grounds for the classification the Act can not be held invalid on that ground. It was for the legislature to determine in the first instance the character of securities that should be subject to the operation of the law and unless the classification is wholly arbitrary and the Court can say that it is without any reasonable basis, the classification is good. We shall under the discussion of the police power of the State cite many cases which not only involve the question of police power, but also involve the question of classification and of interstate commerce. We know that each case cited will be considered for all that it passes upon without citing the same under each separate head. The Constitution of

California which in its classification only mentions sales of stocks on margin and did not prohibit the sale of stocks outright, was held to be valid. Regulation of dealers in milk without regulating dealers in other food supplies was held to be valid. In other words, it was for the legislature to determine to what extent the legislation should go and unless that determination is arbitrary and the Court can say that it is without foundation the classification must stand. The language of Mr. Justice McKenna in a comparatively recent Michigan case is quite pertinent here. We refer to the case of

Citizens Telephone Co. vs. Fuller, 229 U. S. 322, 331.

At the last cited page Mr. Justice McKenna said:

> "Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. Keeney vs. New York, 222 U. S. 525, 536. The State is not bound by any rigid equality. This is the rule—its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.' Sec. 228 U. S. 59, 62, 63. Thus defined and thus limited, it is a vital principle, giving to the Government freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burdens and permitting it to make those 'discriminations which the best interests of society require.'"

While the question involved in the telephone case was a question of taxation, and while it may be said that greater latitude is allowed so far as classification is concerned in taxation matters than in other matters, the language however has a very forceful meaning here.

Let us take up the exemptions involved in Section 3 and see if there is any ground for the classification. Or, to state it otherwise, and more properly, is the classification so arbitrary as that the Court may say that it is without foundation or without any reasonable basis? If so, then such exemption would be void but the balance of the Act would stand. The exemptions are:

(a) Governmental Bonds. There can be no reason why the bonds of the United States, the various States of the Union, or the municipalities should be subject to inspection. They are all issued pursuant to the provisions of law and we have not heard of any one being defrauded who purchased such bonds.

(b) Unsecured commercial paper. We understand that this exemption, together with ("h") are the ones principally aimed at in the objection that has been made by counsel and it is contended by counsel that the term "unsecured commercial paper" applies only to that paper which is neither accommodation paper or endorsed paper. No such construction is given this section by the Commission or by the parties who drew this Act; nor do the terms of the Act bear out such construction. Unsecured commercial paper as we view it is that character of paper which is not secured by real estate or other mortgages but is the ordinary paper which the business man puts into his bank; it may bear his name alone, it may have an accommodation maker, or it may be endorsed paper. None of such paper is regulated by the provisions of this law. One of the reasons for this exemption it might be said was the fact that under the law of 1913 the District Court construed the Act to mean that the business man could not go to his banker and borrow upon his own paper extending beyond twelve months without submitting the same to the Securities Commission. This construction we contended then, and do now, was an extremely forced construction. The

matter of borrowing money from the bank was a matter of private contract and it was not deemed to be within the purview of even the old Act, but in order to clarify that situation so that there might be absolutely no question about it and that it should not apply to the ordinary borrowing of money, the exemption hereinbefore mentioned was put in the Act in question. It was inserted so that there could be no question about the proposition. The former Act it was insisted was invalid because it did not exempt unsecured paper, and this Act is claimed to be invalid because it does not exempt unsecured commercial paper. If in the wisdom of the Legislature the degree of evil or the chance for fraud in the sale of unsecured commercial paper was less than the evil or the liability of fraud in the sale of bonds secured by real estate mortgage, then it was within the province of the Legislature to make such distinction. As was said by this Court, as we shall later challenge the attention of the Court: "Legislation which regulates business may well make distinctions dependent upon the degree of evil." With that as the rule it was within the province of the Legislature to make this distinction. Taking the Act from its four corners it bears the construction we contend for, namely, that the Act in using the term "unsecured commercial paper" used such term to distinguish the ordinary commercial transaction from bonds which are secured by mortgage. If the Act is capable of two constructions that should be given it which gives it life, validity and vitality rather than that construction which renders it defective, unconstitutional and void. In other words the spirit rather than the literal words may sometimes be used. As St. Paul in his epistle to the Corinthians said "For the Letter killeth but the Spirit maketh alive." (2 Cor. III 6.)

(c) Securities which are passed by the Michigan Railroad Commission or Commissions having similar powers. There ought not to be any necessity for an examination of the same

security by two State Boards. Therefore, there was good reason for this exemption.

(d) Securities of State or National banks or trust companies, or building and loan associations. These institutions are regulated by other departments. The State banks and trust companies by the Banking Department; National Banks by Federal authorities; Building & Loan Associations through the Secretary of State's office. There is no reason for the duplication of investigation.

(e) Securities of corporations not for gain. Stocks in companies that are engaged in no commercial enterprise may make no profits and can not be regarded as of the blue sky character. No one purchases a stock in a club or political, charitable, education or benevolent corporation except for the purpose of membership and no frauds are perpetrated in dealing in this class of stocks.

(f) Michigan mortgages where the entire mortgage goes with the Note. These are the ordinary safe loans. The owner of such a mortgage has the absolute control over it. If it is not paid he can institute foreclosure proceedings himself. The sale of Michigan real estate mortgages has not, so far as we have been able to learn, been made a vehicle for fraud in the State of Michigan; they are usually dealt in locally; the purchaser of a real estate mortgage or a mortgage secured by personal property, in probably nine hundred ninety-nine cases out of every thousand knows the property, it lies under his very eyes. While mortgages which are given to secure large bond issues, or upon property in a distant State present an entirely different situation. The property is far away, the opportunity for fraud much greater. If it is a trust mortgage the owner of a bond is one of many; he can not control foreclosure proceedings except by expense out of proportion to his holdings and in many cases not at all. The opportunity for fraud is much greater, the opportunity for investigation of his security much less.

(g) Increase of stock sold to stockholders and stock dividends. Stock purchased by a stockholder in a company in which he is interested is stock in a company with which he is familiar. He knows the value of the property, he knows the value of the stock. There is little or no opportunity for fraud.

(h) The authority is granted to the Commission to approve the standard manuals of financial satistics. This, too, is made much of by the defendants. These standard manuals are the manuals used by every bank in the country as a basis for investment. In these manuals are found the stocks that are dealt in daily on the New York, Chicago, Boston and Detroit Exchanges. The information furnished in these Manuals is as full and complete as is possible attainable. These stocks are dealt in by the sophisticated, by people who deal in them with their eyes open, and there is no showing here, and can be no showing, that great frauds have been perpetrated in the sale of such standard stocks as the New York Central, Pennsylvania, Atchison, Calumet & Hecla, Copper Range and the thousands of stocks that are dealt in on these various exchanges and dealt in by men who deal with their eyes open. But under the Act in question the Commission is given the power to suspend the sale of any of these stocks, to examine and investigate them and to prohibit their sale.

Under this head attention should be challenged to certain allegations of the bill and to statements in the affidavit filed in the Court below. Section 28 of the bill (R. 10) alleges that the Commission created under Act 143 of the Public Acts of 1913 approved certain Manuals. There is no allegation with reference to the approval of Manuals by the Commission created by Act 46 of the Public Acts of 1915 (the Act here assailed). In this section it is alleged that the Standard Statistics Bureau Daily Bond Service and the Standard Statistics Bureau Daily Stock Service were approved. It is further alleged in Paragraph 29 (R. 11):

"That as to certain of said so-called manuals, to-wit, the 'Standard Statistics Bureau Daily Bond Service' the avowed purpose thereof is the supplying of all available information as to securities. That said 'Services' supply information as to failing concerns and as to fraudulent securities as matters of information to their clients and the approval of all of said 'Service' is, therefore, an approval of such fraudulent securities, such failing and insolvent investment companies and securities as well as of solvent investment companies and securities which are valuable and will result in profit to the purchasers thereof."

The affidavit of the members of the Commission is found on page 97 of the Record, and contains the following statement:

"Deponents further say that said Commission is a subscriber to reporting agencies and obtain and receive reports from such reporting agencies; but that none of said reporting agencies, nor the reports of said reporting agencies are treated and regarded as manuals, and that the companies reported in such reporting agencies are not automatically approved by said Commission; nor are the stocks, bonds or other securities reported by such reporting agencies regarded by said Commission as exempt under the provisions of said Act, but that such reporting agencies are used by said Commission to get information in the same manner and in no other manner than such reporting agencies are used by business houses who are subscribers thereto."

It will therefore be seen that the Standard Statistics Service is a reporting agency similar to Dunn and Bradstreet, and that while the Securities Commission used that service to get information with reference to the companies and securities

which are reported in this Service as the ordinary business man uses Dunn and Bradstreet, for the purpose of getting such information as may be available, it does not automatically approve the securities about which it obtains such information.

The only other exemption (i), exempts stocks that were approved under the former Commission. There is no reasonable grounds for saying that these stocks should be again submitted to a commission because whether the former law was good, bad or indifferent, an examination was had under its terms and it is fair to assume that the public officials did their duty and that such stocks were properly approved.

The State has the right to make distinction; the State has the right to classify; the State has the right to select subjects upon which it will legislate and so long as that legislation is not arbitrary, and so long as the Court can not say that the classification has absolutely no reasonable foundation, the legislation is good; recognizing the right to classify, which is recognized by all courts the country over, the objects of the classification and what classification shall be made must rest primarily with the Legislature subject only to review by the Courts when it can be clearly said by the Court that there is no basis for the classification. In other words all doubts must be resolved in favor of the validity of the legislation instead of against the legislation. We will now challenge the attention of the Court to some of the authorities.

Engle vs. O'Malley, 219 U. S. 128.

In this case the question of classification was involved and, citing the Worst case in the 207 U. S., it was held: "Legislation which regulates business may well make distinctions depend upon the degree of evil."

The case of

Brodnax vs. Missouri, 219 U. S. 285

Also had the question of classification under consideration, and it was held that the classification of the Missouri Brokers Acts was a valid classification.

In

Quonk Wing vs. Kirkendall, 223 U. S. 59

The court had under consideration a statute of the State of Montana which exacted a license fee of hand laundries and which exempted steam laundries and did not apply to those so engaged where not more than two women were employed. It was held, distinguishing the Yick Wo case, that the classification was valid. To the same effect see

St. Louis Consolidated Coal Company vs. Illinois, 185 U. S. 203.

Bradley vs. Richmond, 227 U. S. 477;

Was a case involving classification. In this case the Court followed the language of the Supreme Court of the State of Virginia, quoting it as follows:

> "In order to render the classification illegal the party assailing it must show that the business discriminated against is precisely the same as that employed in the class which is alleged to be favored."

Griffith vs. Connecticut, 218 U. S. 563;

An exceptionally well reasoned case on the question of classification and other points herein is

Brady vs. Mattem, 125 Iowa 158;

Upon the question of classification we quote the syllabus on the subject:

"Classification on a reasonable basis of subjects within the police power is within legislative discretion and a reasonable selection which is not merely arbitrary and without real difference does not deny equal protection of the laws within the meaning of the 14th Amendment."

It was said by Chief Justice Chase, in

Veazie Bank vs. Fenno, 8 Wall. 533;

"It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the Bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the Judicial can not prescribe to the Legislative Departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibilty of the Legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporation, it cannot, for that reason only, be pronounced contrary to the Constitution."

V.

POLICE POWER.

It is further urged that the legislation here involved offends the rights of these defendants guaranteed under the 14th Amendment in that it abridges their privileges and immunities as citizens of the United States. In short, it is their claim that they are conducting a lawful business, that the right to

conduct such business is property, and that liberty of contract and liberty of transacting such lawful business is guaranteed them by the 14th Amendment, which rights the State can not infringe. In other words, that the legislation is beyond the police power of the State. The police power of the State is reserved to it and unless the legislation in question transcends the reserved right of the State and is beyond the police power of the State it is valid and not in conflict with the 14th Amendment. The close constructionists for a great many years, and even at this date, insist that the police power of the State is limited to legislation promoting health and good morals alone, but this Court long ago recognized that the police power of the State was much broader than the confines of such limits, and that it included not only the right to legislate with reference to the public health and the morals of the State but that it also included legislation which had for its object the convenience, the welfare and the prosperity of the People of the State, and that any legislation, subject to other limitations of the Constitution, which was productive of the health, morals, convenience, welfare and prosperity of the State was within the police power of the State, and that the Courts would not set aside such legislation unless the Court could say clearly and beyond doubt that such legislation bore no reasonable relation to the object sought. All Courts have been loath to definitely limit the police power or to circumscribe its exercise within fixed and definite rules, but have realized that with changing conditions, with new problems confronting the Legislature for solution, the State must be given a wide latitude in the exercise of its discretion in order to legislate to meet the growing and changed conditions.

This legislation does not deal with specific private contracts; it is not designed to, and does not, legislate with reference to individual contracts; it is not single instances but with a general business. If A sells to B a block of stock that he owns it is a matter of private contract in which it might be said

that the public had no interests and therefore such contracts are not subject to legislation under the police power. But if A goes into the business of selling stock, then it is within the police power of the State to regulate such business and inspect the wares offered to the public. A manufacturing plant engaged in the manufacturing of a given commodity is not regulated in that business by the Act in question; it may manufacture its product, borrow money of its banker or others without let or hindrance, but when it goes into a business other than manufacturing and goes into the business of selling its stock *to the public*, it then becomes an investment company under the Act assailed and subject to its provisions. As to the plaintiffs and intervenors who are dealers and who engage in the business generally of selling stocks to the public, the law may be regarded as imposing a vocational tax. The right of the State to levy such vocational tax is now beyond cavil. As to the investment companies it is a regulatory and inspection measure designed solely to prevent fraud. In short it is the *business* of selling securities that is regulated and the inspection of the wares *offered to the public* that the law covers.

As was said by Mr. Chief Justice Fuller, in

Williams vs. Fears, 176 U. S. 270, 375,

in determining the validity of a statute of the State of Georgia with reference to employment agencies:

> "It would seem, moreover, that the business itself is of such nature and importance as to justify the exercise of the police power in its regulation. We are not dealing with single instances, but with a general business, and it is easy to see that if that business is not subject to regulation, the citizen may be exposed to misfortunes from which he might otherwise be

legitimately protected. Nor does it appear to us that the objection of unlawful discrimination is tenable."

So here we say that the enactment of the legislation under consideration has for its object the improvement of the economic conditions affecting the community at large; that we are not dealing with a single instance but that we are dealing with a general business. Michigan has become a great industrial, and manufacturing State; millions of dollars of stocks in industrial, manufacturing, real estate and mining ventures are being issued monthly. The opportunity for fraud is great; the success of the Ford plant is an excuse for the issuance of millions of dollars of stock in new automobile plants that exist only upon blue prints and in the minds of the incorporators and promoters. Calumet & Hecla is going to be duplicated by every mining proposition; and so we might multiply the propositions that would be foisted upon the public but for this legislation, because the successful manufacturer is expected to be duplicated by every promoter with one lath and an option on sufficient ground to build a factory. It is a mistaken notion, if such a one exists, that blue sky only exists in mining stocks and oil wells. Right now in the State of Michigan without the operation of the Michigan Securities Commission every hamlet, every city and the country cross road would be infested with smooth tongue salesmen offering fly-by-night stock in automobile plants, manufacturing enterprises, real estate companies, with but one object—the garnering of money from the thrifty with nothing in return therefor. So that it is not the case of a single transaction but, as stated by the Chief Justice, it is a case of the "general business" of offering these so-called securities for sale that the Legislature had before it when it enacted the legislation here in question.

We first challenge the attention of the Court to the case of

Otis vs. Parker, 187 U. S. 606.

In this case the validity of a provision of the State Constitution of California was assailed, the provision being as follows:

> "All contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction."

It was said by Mr. Justice Holmes, speaking for the Court at page 610:

> "With regard to the objection that this provision strikes at only some, not all, of the objects of possible speculation, it is enough to say that probably in California the evil sought to be stopped was confined in the main to stocks in corporations. California is a mining State, and mines offer the most striking temptations to people in a hurry to get rich. Mines generally are represented by stocks. Stock is convenient for purposes of speculation, because of the ease with which it is transferred from hand to hand as well as for other reasons. If stopping the purchase and sale of stocks on margin would stop the gambling which it was designed to prevent, it was proper for the people of California to go no further in what they forbade. The circumstances disclose a reasonable ground for the classification, and thus distinguish the case from Connelly vs. Union Sewer Pipe Co., 184 U. S. 540. We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or the denial of the equal protection of the laws."

We next call the attention of the Court to the case of

Brodnax vs. Missouri, 219 U. S. 285.

In this case a statute of the State of Missouri regulating brokers was assailed. While this case may with propriety be cited under other heads of this Brief, we desire to cite it under this subdivision to the following effect: (We quote from the syllabus):

> "In this case, as the statute shows on its face that the subject regulated needed to be regulated for the protection of the public against fraudulent practices to its injury, this court is not prepared to declare that the State has acted beyond its power or the necessities of the case.
>
> While it is the duty of the Federal Courts to protect Federal rights from infringement they should not strike down a police regulation of a State that does not clearly violate the Federal Constitution; they cannot overthrow police legislation because they consider it unwise or inexpedient."

The Court also cites another case coming up from Missouri found in the same volume, and we also challenge the attention of the Court to this case:

House vs. Mayes, 219 U. S. 270.

In the last cited case the Act assailed was entitled: "An Act to prevent fraud in the purchase and sale of grain and other commodities." It was aimed at a custom of the Board which permitted the deduction of one hundred pounds from each carload of grain to equalize the loss from foul stuff in grain. It was held to be within the police power of the State

to pass such an Act, that it did not impair the obligations of contract and was not the taking of private property without due process of law.

The Oklahoma Bank Deposit Act was assailed as being in conflict with the provisions of the Federal Constitution upon the grounds here urged, but it was held that the Act was valid and within the police power of the State. See

Noble State Bank vs. Haskell, 219 U. S. 104.

The Oklahoma statute was also held to be valid when contested by a National Bank. See

Abilene National Bank vs. Dolley, 228 U. S. 1.

It should be borne in mind that the great danger in the sale of securities is that the man of small wages, of moderate wages, of inexperience in financial affairs is the man most liable to be harmed by the sale of fraudulent securities. It should be borne in mind, further, that the general welfare of the community is dependent more upon the general welfare of this class of citizenship than upon the general welfare of the wealthy. A city made up entirely of retired millionaires is never as prosperous as the city made up of active business and laboring men. It is not paternalistic legislation which protects the illiterate, inexperienced laborer because his protection is one of the functions of Government. The State of New York recently passed a law regulating private banking which was assailed upon practically all of the grounds here urged; but the legislation was sustained not only by the State Court but by this Court in

Engle vs. O'Malley, 219 U. S. 128;

We quote from page 136:

"On the other hand, experience has shown that the protection of such depositors against fraud, which is the purpose running through the statute, is especially needed by at least that class of them with whom the persons hit by the statute largely deal. The case cited establishes that the State may regulate that business, and may take strong measures to render it secure. It also establishes that the plaintiff has no such constitutional right to carry it on at will as to raise him above State laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious indiscrimination. The quasi paternal relations shown in argument and by documents to exist between those following the plaintiff's calling and newly-arrived immigrants justifies a supervision more paternal than is needed in ordinary affairs. Whether the court thinks them wise or not, such laws are within the scope of the discretion which belongs to legislatures, and which it is usual for them to exert."

In

Gundling vs. Chicago, 177 U. S. 183,

it was said by Mr. Justice Peckham speaking for the Court at page 188:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power of the State, and unless the regulations are so utterly un-

priate means to such prevention. Enactments similar to this act, having for their object the regulation of the manufacture and sale of substitutes for butter, have been sustained by the courts of last resort in many jurisdictions." (Citing authorities.)

The Court in

Gatewood vs. North Carolina, 203 U. S. 531,

passed upon the validity of the so-called Bucket Shop Act of that State and sustained its validity.

An exceptionally able and well reasoned opinion is found in

Schaake vs. Dolley, 85 Kansas 598;

In this case the validity of a statute of the State of Kansas was involved. This statute permitted the State Banking Commission to accept or refuse an application for a license to organize a State bank. Its validity was assailed upon practically all grounds here involved except the question of interstate commerce. The Act was sustained, and we respectfully submit the opinion to the Court.

We also challenge the attention of the Court under this head to

People vs. Wagner, 86 Mich. 594;

In this case an ordinance of the City of Detroit regulating the size of loaves of bread was involved. It was assailed as not being within the police power of the State. It was said at page 600:

"The police power of a State is not confined to regulations looking to the preservation of life, health, good

> order, and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection."

People vs. Rotter, 131 Mich. 250,

Involved the validity of the oleomargarine Act passed by this State and in common with other States of the union and the Federal holdings. The Act was sustained as a valid exercise of the police power of the State.

The language of the court in

Continental Co. vs. Hattabaugh, 121 Pac. 81,

is significant. It was there said:

> "Judicial opinion is almost unanimous that the State has a constitutional right to enact laws regulating and limiting the right to do business within a State, and the authority for and manner of carrying on such business, and the question is one for each State to settle, and where the Legislature has enacted and prescribed what, to it, are reasonable regulations, this court will be cautious in attempting to discover some imaginary or theoretical reason for annulling such legislation."

The exercise of the police power of the State is not limited solely to regulations pertaining to health, morals or safety of the public. It goes beyond that; it goes to the question of public welfare and public convenience, and legislation by a State which is solely designed to promote *public convenience* is within the police power of the State. We call attention to

L. S. & M. S. Ry. Co. v. Ohio, 173 U. S. 285.

This case had under consideration a statute of the State of Ohio regulating the stopping of trains at certain stations. It was not only assailed as an interference with interstate commerce, but also as beyond the police power of the State. It was said by Mr. Justice Harlan speaking for the Court (292):

> "It is insisted by counsel that these and observations to the same effect in different cases show that the police powers of the States, when exerted with reference to matters more or less connected with interstate commerce, are restricted in their exercise, so far as the National Constitution is concerned, to regulations pertaining to the health, morals or safety of the public, and do not embrace regulations designed merely to promote the *public convenience*.
>
> This is an erroneous view of the adjudication of this court. While cases to which counsel refer involved the validity of State laws having reference directly to the public health, the public morals or the public safety, in no one of them was there any occasion to determine whether the police powers of the States extended to regulations incidentally affecting interstate commerce but which were designed only to promote the public convenience or the general welfare. There are, however, numerous decisions by this court to the effect that the States may legislate with reference simply to the public convenience, subject of course to the condition that such legislation be not inconsistent with the National Constitution, nor with any Act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it. As the question now presented is one of great importance, it will be well to refer to some cases of the latter class."

Authorities are then taken up and considered, and Mr. Justice Harland resumes (pp. 296, 298):

"Now, it is evident that these cases had no reference to the health, morals or safety of the people of the State, but only to the public convenience. They recognize the fundamental principle that outside of the field directly occupied by the general government under the powers granted to it by the Constitution, all questions arising within a State that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the State, and that its legislative enactments relating to those subjects, and which are not inconsistent with the State constitution, are to be respected and enforced in the courts of the Union if they do not by their operation directly entrench upon the authority of the United States or violate some right protected by the National Constitution. The power here referred to is—to use the words of Chief Justice Shaw—the power 'to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same.' Commonwealth v. Alger, 7 Cushing, 53, 85. Mr. Cooley well said: 'It cannot be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition.' Cooley's Const. Lim. (6th ed.) p. 715. It may be that such legislation is not within the 'police power' of a State, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental or legislative exists in each State, by appropriate enactments not for-

bidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the States is entirely distinct from any power granted to the General Government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended. When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government." (Citing authorities.)

The right of the State to exact a license from a broker was sustained by the Supreme Court of Illinois, in

Banta vs. City of Chicago, 172 Ill. 204, 219

We quote from the last cited page:

"It is not urged the ordinance is unreasonable or oppressive in respect of the amount of the license fee, but it is urged the business of a broker is not hurtful to the public peace, safety or morals, and that no other reason can be given why such business should be deemed a proper subject of regulation or prohibition, under the police power or otherwise. It is therefore asserted the city is driven to the position that the ordinance is a revenue measure, and is lawful as such. The terms of the ordinance do not indicate whether the license fee is required for the purposes of revenue or for regulation merely. It is true that in order to be effectual a license

must confer authority to do that which without the license would be illegal; but it does not follow that only such occupations as might be inhibited or regulated under the police power, or for other similar reasons hereinbefore referred to, may be required to take out license in order to legally transact business. The occupation may be lawful in itself and not subject to prohibition in order to compel the taking out of a license, if the purpose is to raise revenue by means of a license fee. (Cooley on Taxation, pp. 596, 597). Therefore the mere facts that the effect of the ordinance is to declare it to be unlawful to transact the business of a broker without license does not indicate whether the purpose is to raise revenue or to regulate and control the business. Mr. Cooley, in his works on Taxation, (p. 597) says that the language of the ordinance, or its terms, may be expected to indicate with sufficient precision whether the license is required for purposes of revenue or for regulation merely, the intendment being that regulation is the object, unless there is something in the language indicating with sufficient certainty that the purpose is to produce revenue. In the view we take of the case it is not material to determine whether the license fee is for revenue or for purposes of regulation. We think it is well settled by repeated decisions of this Court that the State in its sovereign capacity, and the cities and villages of the State by virtue of the grant of the power by the General Assembly, have ample power and authority to impose license fees upon the occupation of a broker and the other trades or occupations mentioned in Section 1 of Article IX. of the Constitution of 1870, for the purposes either of regulation or revenue."

See also upon the subject of police power:

Budd vs. New York, 143 U. S. 517;
Heath & Williams Co. vs. Worst, 207 U. S. 338;
Bacon vs. Walker, 204 U. S. 311.

In the last cited case a statute of the State of Idaho was involved which prohibited the grazing of sheep within two miles of a dwelling house, and it was urged, and authorities were cited, that such legislation was beyond the police power of the State. After considering the cases cited, the Court said (p. 317):

> "These cases make it unnecessary to consider the argument of counsel based upon what they deem to be their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in *Chicago, Burlington & Quincy Railway Company vs. Drainage Commissioners*, 200 U. S. 561, 592. In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate and not offensive. Nor need we make extended comment on the two-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance expressed shows nothing. It does not display the necessities of a settler upon the public lands. It does not display what protection is needed, not from one sheep or a few sheep, but from large flocks of sheep, or the re-

lation of the sheep industry to other industries. These may be the considerations that induced the statutes, and we cannot pronounce them insufficient on surmise on the barren letter of the statute."

Chicago, B. & Quincy R. R. Co. vs. McGuire, 219 U. S. 578,

Involved the right of the State to prohibit contracts between the Railroad Company and its employees limiting liability for injuries made in advance of the injuries received and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received after the contract. The Act under consideration was an Act passed by the Legislature of the State of Iowa. We desire to call the attention to it particularly because of the fact that the Court in the opinion quote the language of the Allgeyer case so frequently and so persistently urged upon the Court by Counsel for the appellees and then comments upon the same. We quote what was said by the Court at p. 566:

"It has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution. Allgeyer vs. Louisiana, 165 U. S. 578; Lochner v. New York, 198 U. S. 45; Adair vs. United States, 208 U. S. 161. In Allgeyer v. Louisiana, supra, the court in referring to the Fourteenth Amendment, said (p. 589): 'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation,

and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.' But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

We have cited in this brief some of the cases involving the validity of oleomargarine Acts. In all of these cases it has been urged that the business of manufacturing oleomargarine is a legitimate business; that oleomargarine is a healthy food product, which fact has generally been conceded in the prosecutions under these various Acts. It has been urged in these cases, as it is here, that the manufacturer was engaged in a legitimate business; that he had the right to pursue that calling under the Fourteenth Amendment, and that any legislation which interfered with the conduct of that lawful business was violative of his rights thereunder. This legislation has uniformly been upheld as an exercise of the police power, not often upon the ground of health but generally upon the ground of preventing fraud and deception in the sale of such commodity. We desire to call the attention of the Court to one further oleomargarine case, the original one, that of

Powell vs. Pennsylvania, 127 U. S. 678.

We quote commencing at page 684, omitting such comment as may not be important here:

"The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. * * *

The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property; and while, according to the principles upon which our institutions rest, 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself;' yet, 'in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment exercised either in the presence of public opinion or by means of the suffrage.' Yick Wo v. Hopkins, 118 U. S. 370. The case before us belongs to the

latter class. The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

We desire to call the attention of the Court to two recent decisions of the Supreme Court of the State of Michigan, one of which has been affirmed in this Court. We refer to

People vs. Brazee, 183 Mich. 259,

affirmed by this Court in

Brazee vs. Michigan, No. 15 Advance Opinions, P. 561;

and

Jasnowski vs. Connelly, Judge, 158 N. W. R. 229,

The first of these cases involved the validity of the private employment agency Act. It was urged by Brazee that this legislation was beyond the police power of the State. It was in-

sisted by us there, as it is here, that the legislation was legislated with reference to a general business not with reference to specific transactions. It was urged there, as is urged here, that while the business was a legitimate business and if honestly conducted worked to the good of the public. So here the brokerage business is a lawful business and if honestly conducted works to the good of the general public. We desire to quote what was said by Mr. Justice Brooke in the Brazee case with reference to the police power:

> "The 'police power' is said to be a power or organization of a system of regulations tending to the health, order, convenience, and comfort of the people and to the prevention and punishment of injuries and offenses to the public. It is the expression of an instinct of self-preservation and characteristic of every living creature, an inherent faculty and function of life, attributed to all self-governing bodies as indispensible to their healthy existence and to the public welfare. It embraces all rules and regulations for the protection of life and security of property. 28 Cyc. p. 652; 31 Cyc. P. 902. It has for its object the improvement of social and economic conditions affecting the community at large and collectively with a view to bring about 'the greatest good of the greatest number.' Courts have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power. It is elastic and is exercised from time to time as varying social conditions demand correction."

The second of these cases involved the validity of Act 276 of the Public Acts of 1913 which was designed to prevent fraudulent advertising. It was urged that this was beyond the police power of the State and that the language of the statute "deceptive and misleading" was not sufficiently definite.

As is claimed here a sufficient standard was not set. It was held, however, that the legislation was sufficiently specific.

We also call attention upon this question to

Halter vs. Nebraska, 205 U. S. 34.

This case had under consideration a law of the State of Nebraska prohibiting the use of the American Flag for advertising purposes. In speaking of the police power, Mr. Justice Harland said (40):

> "Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme law of the land, a State possesses all legislative power consistent with the republican form of government; therefore each State, when not thus restrained and so far as this Court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people."

We also challenge the attention of the Court to the very recent case of

Rast vs. VanDeman & Lewis, 240 U. S. 242,
Tanner vs. Little, 240 U. S. 369,
Pitney vs. Washington, 240 U. S. 387.

These cases involved the validity of various trading stamp Acts, most of which Acts it had been held by the lower courts, both State and Federal, to be beyond the police power of the State and to infringe the commerce clause. The legislation was sustained as against all exceptions. One of the reasons for the exercise of the police power being that the legislation prevented improvident buying, thereby being in the interest of

the prosperity of the public. If it is within the police power of the State to legislate for the purpose of preventing improvident buying we respectfully submit that it is within the police power of the State to legislate to prevent fraudulent selling. We desire also to cite the following cases:

Price vs. Illinois, 238 U. S. 446;
Miller vs. Wilson, 236 U. S. 373;
German Alliance Insurance Co. vs. Kansas, 233 U. S. 389;
State vs. Prince, 77 N. H. 581;
Armour & Co. vs. North Dakota, 240 U. S. 510.

While we have not attempted to cite all of the authorities, or any considerable number of those passing upon the power of the State, still an examination of these authorities will show that the language of Mr. Justice Brooke in the Brazee case is fairly in point as to the exercise of this reserved power in the State. That which bespeaks the good of the public, either the public health, public morals, public welfare, public convenience, the public prosperity, is within the police power of the State and an examination of these authorities demonstrate that it is not necessary that the Court should find that the measure of necessity works to the good of the public health or the public morals or the public welfare, or the public convenience, or the public prosperity. Unless the Court can say that the measure bears no reasonable relation to the subject, the legislation is valid. The argument in all of these cases has been that the business regulated was a legitimate business and beyond governmental control. The fact that the business is a legitimate business in no way relieves it from governmental control. The banking business is an honorable business, but it is subject to regulation, both as to corporate banks and private banks under the authorities cited; the raising of sheep is a legitimate enterprise and has been recognized as such

since David watched over his flocks in Judea, and yet under the authorities cited it is subject to State regulation and State Control. The conduct of an employment agency is a legitimate business but it is subject to control; the conduct of a brokerage establishment similar to that of the Appellees is the conduct of a lawful business, but it is nevertheless subject to control as the Missouri, Illinois and other cases demonstrate. The oleomargarine cases all proceed upon the theory that the product is wholesome but they are regulated to prevent fraud in their sale; the manufacture of fertilizer is a legitimate business, yet it is subject to regulation; the manufacture of stock food is a legitimate business but it is subject to State regulation and State control. And so we might go down the line with the various classes of business legitimate, honorable, if properly conducted, but nevertheless subject to State regulation and State control. So we respectfully submit in the case at bar that the defendants in error while engaged in a business in and of itself legitimate, are engaged in a business that is subject to State regulation and State control. The purpose of the Act as expressed in its title is to prevent fraud. The preventing of fraud is clearly within the police power of the State and the manner and method in which and by means of which that fraud shall be prevented is within the discretion of the Legislature and is not for the Courts to determine. We respectfully submit that the legislation in question is clearly within the police power of the State.

VI.

INTERSTATE COMMERCE.

It is claimed that the Act in question is a regulation of interstate commerce. There is no allegation in the bill, undoubtedly because none could be made, that the plaintiffs in the Court below and the intervenors do not maintain offices and places of business within the State; nor is there any claim made that the stocks, bonds and other securities handled by the plaintiffs and intervenors, and which are brought into the State, are sold in original packages. Indeed it is the claim, as we understand it, of the Appellees and apparently the view taken by the Learned Judges who heard the motion for injunction, that stocks, bonds and securities are Articles of interstate commerce, that it was beyond the police power of the State to enact the legislation in question, and that such legislation levies a direct burden upon interstate commerce and therefore is void. By reason of jurisdictional limits it could hardly be urged, and has not been urged by the Appellants, that the Act in question would operate to prevent the advertisement by any investment company or broker of stocks, bonds and securities in a Chicago newspaper and send the stocks or other securities through the mail to a Michigan customer. It is the claim, however, of the Appellants that parties following the avocation of brokers in the State of Michigan, no matter how small their branch office may be nor where they may reside, who conduct the business within the State of selling stock, bonds and securities, not exempt under the provisions of the Act in question, are regulated by this Act and that the stocks, bonds and securities sold by them and offered for sale by them within the State are subject to the provisions of this Act irrespective of whether such stocks originate in Michigan or are sent into the State from some other State in the Union. In

other words, even though stocks, bonds and other securities may be Articles of interstate commerce, which we shall deny, and while the State may not regulate the sale of such stocks, bonds and other securities where such sale takes place outside the State of Michigan, still if such sale takes place within the State of Michigan unless in original packages the State may regulate such sale, may levy a vocational tax upon the business if such vocation is followed within the State and may inspect the articles offered for sale even though such Articles are brought into the State from some other State in the Union.

We shall discuss the question of interstate commerce under three sub-heads:

(a) Are stocks, bonds and other securities *Articles* of interstate commerce?

(b) May the State investigate and inspect Articles of interstate commerce for the purpose of preventing fraud, and does the commerce clause or any other clause of the Constitution secure to non-residents, or any one else, the privilege of perpetrating a fraud upon the public?

(c) Congress not having legislated upon this subject may the State legislate within its police power, such legislation to be effective until Congress acts?

A.

Are stocks, bonds and other securities articles of interstate commerce? A stock certificate is evidence that the party to whom the same is issued has an interest to the amount named in the certificate in the property of a corporation. It is a muniment of title; it is this and nothing more. It is not a commodity. The property of the corporation is

permamently located; it may be in Michigan or it may be in Alaska. The transfer of the certificate to a Michigan holder does not contemplate that the property of the Corporation will be brought into Michigan in interstate commerce. It is simply the transfer of evidence of title in property permanently located. It is therefore, we respectfully submit, only *evidence* and is not an *article* of commerce. Bonds and other securities are choses in action, evidence of an indebtedness, evidence of a contract to pay money, which contract is regulated by the laws of the State in which it is made. A mortgage is a lien; bonds and mortgages are usually payable where issued and do not contemplate a transfer of any property in interstate commerce. Dealing in securities which are issued in the various States of the Union and are not regulated by Federal law but by the statutes of the State of issue and enforceable only in accordance with the law of such State are not *articles* of interstate commerce.

Early in its history the State of Louisiana imposed a tax upon all money and exchange brokers doing business within the State. One Nathan was engaged in the business of buying and selling foreign exchange. He dealt not at all in domestic exchange; he was proceeded against for failure to pay the brokerage tax of $250.00 and defended upon the ground that he was engaged in interstate commerce. The case is reported as

Nathan vs. Louisiana, 8 How. 73;

And it was then held that while foreign bills of exchange might be instruments of commerce, they were not commerce, and that the State had the right to impose a tax upon all brokers dealing in foreign exchange; and further that the State had the right to tax its own citizens for the prosecution of any particular business or profession within the State. It was there said:

"No state can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import by being mingled with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation.

A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable.

The dealer in bills of exchange requires capital and credit. He generally draws the instrument, or it is drawn at his instance, when he is desirous of purchasing it. The bill is worth more or less, as the rate of exchange shall be between the place where it is drawn and where it is made payable. This rate is principally regulated by the expense of transporting the specie from the one place to the other, influenced somewhat by the demand and supply of specie. Now the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a state in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on."

The case was followed with approval, in

Paul vs. Virginia, 8 Wall. 168;

In which case the court had under consideration the question as to whether insurance companies were engaged in interstate commerce, and whether the State could regulate them. It was not only held that they were not engaged in interstate commerce and that the State could regulate the manner in which insurance business was conducted, but it was also held that corporations were not persons within the meaning of the Federal Constitution guaranteeing equal protection; that they were an artificial being; that the State which brought them into being could regulate the manner of their conduct of their business and could put such restrictions and limitations about them as it saw fit. In both of these cases the parties complaining were similarily situated to the plaintiffs and the thing in which they dealt, being contracts, were held not to constitute interstate commerce within the meaning of the Federal Constitution.

In

State vs. Stone, 118 Mo. 388,

the Supreme Court of Missouri had the same questions under consideration as in the Virginia case, and held that the State had the right to make such requirements as it saw fit with reference to the conduct of insurance business. The claim of the companies was denied and the right of the State upheld. It was held that non-resident corporations had only such rights as the Legislature saw fit to give them, and that the State had the right to regulate all trades, callings and professions so long as it did not discriminate between citizens. There was no pretense in this case, however, as we understand it, but that the provisions of the insurance laws of the State of Missouri applied alike to resident and non-resident companies; nor is there any pretense that in the law in question there is any discrimination between a resident and a non-resident corporation, co-partnership or individual.

While it will undoubtedly be urged that the lottery case in effect over-rules these decisions we can not accede to such contention. The lottery case as will be remembered was an exceptionally strong case. The opinion was by a divided court (five to four) and it was said in the majority opinion (188 U. S. 353):

> "We now come to inquire whether there is any solid foundation upon which to rest the contention that Congress may not regulate the carrying of lottery tickets from one State to another, *at least by Corporations or Companies whose business it is, for hire, to carry tangible property from one State to another.*"

The law under consideration was one to regulate express companies and it was not intimated that either the Nathan case or the Paul case was over-ruled. In the conclusion of the opinion it is said by Mr. Justice Harlan who delivered the majority opinion (363):

> "We decide nothing more in the present case than that lottery tickets are subject to traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States, Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress."

In other words the Act under consideration was a Federal Act where Congress had spoken on that subject.

B

The purpose of this Act as its title indicates and as its provisions show is to prevent the perpetration of frauds within the State of Michigan through the sale of fraudulent securities. The underlying thought in this legislation being preventative of a perpetration of frauds rather than the punishment after such fraud has been perpetrated. In other words, the underlying principle involved here is the inspection and investigation of securities before a fraud has been perpetrated in their sale, the power of the Commission to disapprove being limited to the sole grounds of fraud. If it be assumed that securities are articles of commerce, can it be said that because an article of commerce is brought in from another State that the commerce clause protects its holder in perpetrating a fraud upon the purchaser? In other words, is the police power of the State so limited in legislating upon the subject of fraud that its legislation upon that subject can apply only to articles produced within the confines of the State? To state the proposition is to refute it. As was said by this Court in

Plumley vs. Massachusetts, supra:

> "Can it be that the Constitution of the United States secured to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of *any*

articles, even those that may have become the subject of trade in different parts of the country?"

The State has the right to pass regulatory and licensing measures even though the articles dealt in are brought into the State in interstate commerce and the State has the power to investigate and inspect articles though produced in a sister State, provided such right is within the police power of the State. We shall challenge the attention of the Court to a few authorities upon this subject:

Hatch vs. Reardon, 204 U. S. 152,

In this case the validity of the stamp tax upon the sale of stocks in the New York market was involved.

The purpose of the Act here involved must be apparent to the court, the purpose being that no one shall be permitted to sell in the State of Michigan and separate the people of the State from their money through the medium of fraudulent mining stocks, oil stocks and other fly by night ventures. The same reason that would give to the Legislature the right to prescribe that in the sale of commodities honest weights and measures should be used, would apply with equal force in the sale of securities, and whether those commodities which are offered for sale are shipped in from a foreign state or not, the State has the right under its police power to provide for an inspection and weighing of those commodities even though those commodities were shipped in in interstate commerce. Not only has the State the right to require the inspection, but it also has the right to demand a fee for such inspection. See upon this question the case of

Coal Company vs. Louisiana, 156 U. S. 590.

The opinion is not a lengthy one, and we refrain from quoting, but request the court to consider it as it bears upon two ques-

tions involved in this case. (1st) Interstate commerce; (2nd) The police power of the State.

We also call attention to the case of

Savidge vs. Jones, 225 U. S. 501.

This is a very recent case and involved the validity of an Indiana statute aimed towards pure food, and among other provisions required the placing of stamps upon stock food and the filing with the State chemist of the formula used in its composition. It was held that the Act was not violative of the commerce clause of the Federal Constitution; that the Company was not deprived of due process of law in requiring the formula to be disclosed, and that it was a valid exercise of the police and taxing power of the State. It should be said in passing that upon the record the question of wholesomeness or want of wholesomeness of the compound was not involved so that it was not upheld by reason of its being a health measure.

The same conclusion was reached in

Standard Food Company vs. Wright, 225 U. S. 540;

Where a similar statute of the State of Iowa was involved and was likewise sustained.

We shall also call the attention of the Court upon the same proposition to

Singer Manufacturing Company vs. Wright, 33 Fed. Rep. 121.

It should not be assumed that every commodity which has come into this State by interstate shipment is immune from all State legislation by reason of the commerce clause in the Federal Constitution. To so hold would in effect concede that

the State had surrendered its police power to Congress under said clause. Nor should it be held, nor has it been held, that those regulations within the police power of a State are invalid simply because incidentally interstate commerce may be affected; nor is the state precluded from legislating where Congress, as in this matter, has failed to act.

We desire to cite some further cases which might be cited under a later head in our brief, but in which it has been insisted that the State was powerless to act. Many of these cases have been where Congress has not spoken on the subject, while others are police regulations upon interstate carriers which have been held not to be repugnant to the commerce clause of the Federal Constitution. We first call attention to

R. R. vs. New York, 165 U. S. 628.

The Act under consideration was a regulation with reference to the heating of passenger cars and directing guards and guard posts placed on railroad bridges and trestles and the approaches thereto. It was said by Mr. Justice Harlan speaking for the Court, page 631:

> "According to numerous decisions of this Court (some of which are cited in the margin) sustaining the validity of state regulations enacted under the police powers of the State, and which incidentally affected commerce among the States and with foreign nations, it was clearly competent for the State of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that state, by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the States must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution, (Gibbons

vs. Ogden, 9 Wheat. I, 211,) the mere grant to Congress of the power to regulate commerce with foreign nations and among the States did not, of itself and without legislation by Congress, impair the authority of the States to establish such reasonable regulations as were appropriate for the protection of the health, the lives and the safety of their people. The statute in question had for its object to protect all persons traveling in the State of New York on passenger cars moved by the agency of steam against the perils attending a particular mode of heating such cars. There may be reason to doubt the efficacy of regulations of that kind. But that was a matter for the State to determine. We know from the face of the statute that it has a real, substantial relation to an object as to which the State is competent to legislate, namely, the personal security of those who are passengers on cars used within the limits. Why may not regulations to that end be made applicable, within a state, to the cars of railroad companies engaged in interstate commerce as well as to cars used wholly within such State? Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state, as those who travel on domestic trains. The statute in question is not directed against interstate commerce. Nor is it within the meaning of the Constitution a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the State to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several

states, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned."

In

Nashville M. C. Ry. Co. vs. Alabama, 128 U. S. 96;

The court had under consideration a local act which required locomotive engineers and other persons employed by a railroad company in a capacity which calls for ability to distinguish and discriminate between color signals, to be examined from time to time by a State tribunal and which required the company to pay for such examination. It was held to be valid legislation, not depriving the company of property without due process of law, and not in conflict with the commerce clause of the Federal Constitution even though it indirectly affected common carriers in interstate commerce.

See also

Smith vs. Alabama, 124 U. S. 465.

In

Hennington vs. Georgia, 163 U. S. 299,

The Court had under consideration an Act forbidding the running of freight trains on Sunday. It was insisted that this interfered with interstate commerce and was void. The Act however was sustained upon the theory that it was a proper police regulation within the power of the State to enact.

Emert vs. Missouri, 156 U. S. 296

Involved a hawkers and peddlers Act, in which there was no discrimination between domestic and foreign peddlers (nor is there any discrimination in the Act in question). It was held that the Act was not repugnant to the commerce clause of the Federal Constitution.

State vs. Harbourne, 70 Conn. 484.

In this case the prosecution was brought for violating a statute of the State of Connecticut prohibiting gambling and wagering. The money was deposited within the State to be transmitted by telegraph outside the State and it was urged that such transmission of such money outside the State was interstate commerce and therefore could not be regulated by local legislation. The Court declined to follow the contention and sustained the validity of the Act.

Patapsco Guano Co. vs. North Carolina, 171 U. S. 345.

In this case a statute of the State of North Carolina requiring the inspection and regulating the sale of commercial fertilizer was attacked as being in contravention of the Commerce Clause of the Federal Constitution and as beyond the police power of the State. The Act was sustained as against both of these contentions. At page 354 it was said:

> "Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and in so doing protecting the citizen from fraud. Necessarily, in the latter aspect, *such laws are applicable to articles imported into, as well as to articles produced within, a State.*"

It was further said at page 361:

> "The act of January 21, 1891, must be regarded, then, as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the State, and the charge of twenty-five cents per ton was intended merely to

defray the cost of such inspection. It being competent for the State to pass laws of this character, does the requirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of section ten of article one expressly recognizes the validity of State inspection laws, and allows the collection of the amounts necessary for their execution; and we think the same principle must apply to interstate commerce.

In any view, the effect on that commerce is indirect and incidental, and 'the Constitution of the United States does not secure to any one the privilege of defrauding the public.'"

Upon the same question we also call attention to

Crossman vs. Lurman, 192 U. S. 189.

In this case a law of the State of New York prohibiting the sale of adulterated foods and drugs was involved, the facts being substantially that the parties had entered into an agreement, Crossman & Bros. being the sellers, and Lurman & Company the purchasers. The sellers lived in New York, the purchasers in Baltimore. Five hundred bags of Rio coffee was agreed to be sold by Crossman & Bros. to Lurman & Company; the coffee was to be shipped to New York by a designated steamer and from there shipped to Baltimore. The contract was a New York contract and it was insisted that the New York pure food drug Act was in restraint of commerce and therefore void. The Court, however, held that the regulation was within the police power of the State and the *Plumley* case was cited with approval, and it was held not to be in restraint of interstate commerce. Both this case and the case last cited by us were cases where inspection laws

were attacked. The right of the State to pass such inspection laws and inspect commodities not only of domestic commerce, but also of interstate commerce and foreign commerce, was upheld and sustained.

The legislation was upheld as has all similar legislation been upheld and in none of the cases was the question of the wholesomeness of the product involved, but the general right of the State to pass inspection laws upon wares that were offered for sale to the public generally has been recognized and upheld as not infringing the commerce clause of the Federal Constitution and is within the police power of the State.

Silz vs. Hesterberg, 211 U. S. 31.

This case involved the game law of the State of New York, the respondent having in his possession during the closed season one golden plover and one imported grouse, both shipped to him from a dealer in London. They were taken during the open season and were shipped to him in foreign commerce. He contended that the State law prohibiting him from having this game in his possession deprived him of his property without due process of law, and also was in restraint of commerce. It was said (p. 40):

> "It is next contended that the law is an attempt to unlawfully regulate foreign commerce which, by the Constitution of the United States, is placed wholly within the control of the Federal Congress. That a State may not pass laws directly regulating foreign or interstate commerce has frequently been held in the decisions of this court. But while this is true, it has also been held in repeated instances that laws passed by the States in the exertion of their police power, not in conflict with laws of Congress upon the same sub-

> ject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws."
>
> Allen vs. Riley, 203 U. S. 347,

By analogy is applicable here. The State of Kansas had passed a law that, before sale of patent rights, an authenticated copy of the letters patent should be filed in the office of the County Clerk. It was urged that this was an infringement upon the power of Congress to regulate granting and sale of the patents, but it was held—

> "While a State may not pass any law prohibiting the sale of patents for inventions or nullifying the laws of Congress regulating their transfer, it has the power, until Congress legislates on the subject, to make such reasonable regulations in regard to the transfer of patent rights as will protect its citizens from fraud."

Approved in Ozan Lumber Co. vs. Union County Bank, 207 U. S. 251.

> McLean vs. Denver & Rio Grande R. R. Co., 203 U. S. 38;

Involved an inspection law of the territory of New Mexico, which inspection law prohibited the shipment from the State of hides which had not been inspected pursuant to its terms. It was objected that this interfered with interstate commerce and levied a direct tax upon that commerce as it specifically applied to out of state shipments. The Court, however, sustained it as an inspection law, as being within the police power of the State, and not in conflict with the Commerce Clause of the Federal Constitution. It might be interesting to know that one of the reasons assigned by the Court was that it was designed to prevent thieves from shipping hides of cattle stolen by them out of the State. We do not apprehend that a majority or any considerable number of the citizens of

the then territory of New Mexico were cattle thieves, but an inconvenience was necessitated upon the majority and the vast majority of the citizenship of New Mexico in order that cattle thieves might be more readily apprehended and punished. And yet it is said in assailing the Act in question that the State is powerless to prevent the sale of millions of dollars' worth of worthless stock because complainants are put to some inconvenience in the plying of their trade. We quote what was said in the *McLean* case, commencing at page 54:

> "It is urged that this is a mere revenue law and in no just sense an inspection law, and, therefore, not within the police power conferred upon the Territory. It is true that inspection laws ordinarily have for their object the improvement of quality and to protect the community against fraud and imposition in the character of the article received for sale or to be exported, but in the *Patapsco case, supra,* it was directly recognized that inspection laws such as the one under consideration might be passed in the exercise of the police power, and such was the view of Mr. Justice Bradley in *Neilson vs. Garza, supra,* decided on the circuit. We see no reason why an inspection law which has for its purpose the protection of the community against fraud and the promotion of the welfare of the people cannot be passed in the exercise of the police power, when the legislation tends to subserve the purpose in view. In the Territory of New Mexico, and other parts of the country similarly situated, it is highly essential to protect large numbers of people against criminal aggression upon this class of property. The exercise of the police power may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of the

> people of the Territory are interested, seems to us an obviously rightful exercise of this power. It is true it affects interstate commerce, but we do not think such was its primary purpose, and while it may have an effect to levy a tax upon this class of property, the main purpose evidently was to protect the people against fraud and wrong."

We do not apprehend that the character of the article involved is important if it is such an article as inspection is proper before it is placed upon the market (and the question of propriety of such inspection must be largely left to the State) then the State may in the exercise of its police power provide for such inspection irrespective of whether the article is shipped in in interstate commerce or not. This is the rule and must of necessity be the rule, otherwise impure food stuffs would be immune from inspection because shipped into the State from a sister State, and the State's hands would be tied in the regulation of the sale of any commodity no matter how dangerous to the public health, convenience or welfare, simply because the article had crossed the border line of the State. Such a conclusion we respectfully submit is not supported by any of the authorities and is in conflict with the rights of the State.

C.

Congress has not legislated upon this subject. Assuming, but not conceding, that securities are articles of commerce and the regulation of their sale within the power of Congress, is the State powerless to prevent fraud in their sale pending congressional action? We respectfully submit that

The Minnesota Rate Case, 230 U. S. 352,

answers this contention. We quote from the syllabus:

"There remains to the States the exercise of the power appropriate to their territorial jurisdiction in making suitable provision for local needs. The State may provide local improvements, create and regulate local facilities, and adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved.

Where matters falling within the State power, as above described, are also by reason of their relation to interstate commerce within the reach of the Federal power, Congress must be the judge of the necessity of Federal action; until Congress does act, the States may act.

The paramount authority of Congress enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, Congress may displace local laws by substituting laws of its own."

See also

Compagnie Francaise vs. Board of Health, 186 U. S. 380.

Further citation of authorities seems unnecessary to establish this well recognized rule. To re-state our proposition upon the question of interstate commerce we insist:

First, That securities, the sale of which in the State of Michigan are regulated by the Act in question, are not articles of commerce;

Second, The commerce clause of the Constitution does not inhibit legislation to prevent fraud legislation within the police power of the State because of the fact that the articles

offered within the State were brought from some other State;

And, third, That Congress not having spoken upon the subject and the legislation being conducive to the welfare and prosperity of the people of the State and within its police power is valid.

VII.

Some point was attempted to be made by one of the intervenors that the Court should say notwithstanding the Legislature had in form repealed Act number 143 of the Public Acts of 1913, that the Court could say that the Legislature had not repealed this Act but had amended it by the Act in question. We do not understand just what system of reasoning counsel relies upon to give the Court authority to so construe the Act in question, but if it is a question for the Court as to whether the former Act was repealed by the present Act, then it is a question for the State Court and its determination should control. The State Court has said that Act 46 of the Public Acts of 1915 repealed Act 143 of the Public Acts of 1913, in the case of

Howe vs. Doyle, 154 N. W. R. 62.

VIII.

It should be said in a general way that at the present time, not only the men of large means, but also the men of smaller means, including the laborer are in a thrifty condition so far as prices of the commodities they sell, their wages and their profits are concerned. A great many companies during the present European war have made fabulous profits. The success of Bethlehem steel, General Motors and many so-called war stocks is made the basis of the exploitation of numerous fraudulent companies. As we have indicated before, gold mines and

oil wells that existed only in imagination are not the only vehicle for fraud. A considerable percentage of the articles of incorporation filed in the office of the Secretary of State of the State of Michigan at the present time are related to the automobile industry, this state producing over one-half of the entire output of the country. A large number of the corporations organized in the State are either automobile manufacturing companies or companies producing some of the accessories. If these companies are honestly organized they will make substantial profits. The success of the automobile industry in Michigan is pointed to by every fraudulent promoter who seeks to sell stocks in an automobile or accessory company to the laboring men at Detroit who are engaged in this trade. He sees the success of the company in which he is employed and is quite prone to believe the smooth tongued promoter who may have nothing but a blue print of his car, an option on a piece of real estate or a prospectus. Michigan is also a great copper producing state, its copper mines having paid millions to its stockholders. The high price of copper makes good talking points for the promoter of a copper mine located in Arizona, Alaska or at some distant point. Why should the promoter of a fraudulent scheme be permitted to sell his stock in a fraudulent enterprise, pocket his profit, leaving only a prosecution for common law or statutory fraud as the only solace to the men who put their money into his enterprise? That the State may legislate to prevent fraud cannot be questioned, the method and the means of preventing that fraud being for the Legislature; if in the wisdom of the Legislature the fraud can be prevented by investigation before sale, why should the hand of the state be stayed, and why should it be said that its police power only permits it to punish after sale? Why should the legislature not prevent the fraud rather than punish after being perpetuated? We respectfully submit that if in the judgment of the Legislature the method here devised will prevent the fraud before its perpetration, that it is within the

province of the State to so legislate. That such fraud does exist in the sale of stocks, and that fraudulent schemes would be foisted upon the public but for this law is clearly demonstrated by the records of the Michigan Securities Commission which are public records, and which show that over five million dollars of issues submitted to that Commission had been found to be fraudulent and their sale has been prevented in this State.

We have spoken of the industrial conditions of the State of Michigan. Undoubtedly, the fraudulent exploitations of stocks in other states of the union equal that of Michigan. At least the legislatures of twenty-two states of the union have in their judgments found that such evil existed and had devised as the remedy laws of substantially the same character as the Michigan Act. These states, together with a reference to the laws, are as follows: Arizona. Chapter 9, Sections 2259 to 2271 Inc. Gen'l Laws. Arkansas. 1915 P. A. (Not in Law library.) California. Chapter 251, Sec. 2235 indexed "Investment Companies." General Laws. Florida. Chapter 6322 (No. 2) Laws of Florida, 1913. Georgia. Chapter 2, Art. 9, Sec. 10 No. 2899. Chapter 2, Art. 9, Sec. 10 (a) No. 2909. Idaho. Chapter 117 (S. B. No. 5) Session Laws 1913. Iowa. Chapter 13b—Sec. 1920 T. Supp. to Code of Iowa 1913. Repealed and amended in 1915 by Sec. 1920 u and subsequent sections in Supplemental Supp. Kansas. Chapter 164, Laws of Kansas, 1915. Louisiana. Sections 6485 to 6490, same being Act 40 of 1912 laws. Indexed under "Registration of stock and bond sellers." Maine. Chapter 209, Laws of Maine 1913. Missouri. C. S. S. B's 78 and 79, Laws of Missouri 1913. Montana. Chapter 85, laws 1913, P. 1051 Revised Code 1915. References are to pages in Miscellaneous laws. Nebraska. Art 21, Chapter 14, Secs. 248 to 263 inc. Revised Statutes 1913. No. Dakota. Chapter 91, S. B. 203, page 115 Laws of No. Dakota, 1915. Ohio. H. B. 46 (P. 110 laws of 1914) to amend Secs. 6373 and subsequent Secs. of Gen'l Code of Ohio. I find no amendment in

1915. Oregon. Chapter 341 of laws of 1913. So Carolina. I find no laws indexed. So. Dakota. Chapter 275 Session Laws of 1915, page 657. Texas. Chapter 32 (H. B. No. 9) laws of Texas 1913, P. 66. Vermont. Act No. 170 P. A. 1912, page 196. West Virginia. Chapter 18 laws of 1915, page 202. Wisconsin. Chapter 85, Secs. 1753-58, page 1356 Wis. Statutes 1915.

The passing of acts similar in purport, in fact some although identical with the Michigan statute is indicative of the Legislative judgment that there is an evil growing out of the sale of stocks, bonds and other securities and that such evil should so far as possible be prevented by enacting legislation which prohibits the sale of all stocks, bonds and securities (except such as are exempt and do not need investigation) until their fraudulent character shall be investigated by a commission created by the State. While it is true that this fact is not controlling upon the court, it is evidential in the highest degree that such evil does exist. An examination of the reports of the court of last resort of the State of Michigan shows that no action of the present commission and no action of the commission created under the act of 1913 has ever been reviewed in the court of last resort, although the Commission passes upon securities aggregating two to three million dollars per month. No honest industry in the State of Michigan has suffered by reason of this law. Fraudulent issues have been driven from the State. The money that would have gone into fraudulent enterprises has been invested in corporations honestly created and honestly conducted. The general prosperity of the State has been served by this particular litigation. We respectfully submit that the act in question contains none of the invalidities urged against it, that the order of the court below should be reversed and the injunction dissolved.

Respectfully submitted,

GRANT FELLOWS,

Attorney General,

Attorney for Appellants.

AMICUS CURIAE BRIEF

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

Nos. 413, 438, 439, 440, 860.

FRANK W. MERRICK, JOHN W. HAARER and GRANT FELLOWS, *Appellants,*

vs.

N. W. HALSEY & CO., ET AL., and THE WEIS FIBRE CONTAINER CORPORATION, *Appellees.*

and two other cases.

BRIEF, AMICUS CURIAE, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL INVOLVING THE CONSTITUTIONALITY OF THE BLUE SKY LAWS OF OHIO, MICHIGAN AND SOUTH DAKOTA.

Appeals from the District Court of the United States for the Districts of Ohio, Michigan and South Dakota.

GEORGE COSSON,
Attorney General of Iowa,

WALTER C. OWEN,
Attorney General of Wisconsin.

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Attorney General of Wisconsin.

STATEMENT.

The National Association of Attorneys General of the United States held its regular annual convention at Chicago just preceding the American Bar Association in August, 1916. Inasmuch as nearly one-half of the states of the Union have already passed blue sky laws, and considering that in every state in the Union, legislation in some form is under consideration, the systematic and far-reaching attacks made by the investment companies on the blue sky laws of the several states received the serious consideration of the convention, and it was the consensus of opinion that notwithstanding able arguments would be presented by the attorneys general of Ohio, Michigan and South Dakota, a brief, *amicus curiae*, should be filed on behalf of the National Association. Accordingly a committee was named to prepare such brief in this court, and the following men were designated: George Cosson, Attorney General of Iowa, and Walter C. Owen, Attorney General of Wisconsin.

The writer of this argument has read the briefs filed by Edward C. Turner, Attorney General of Ohio, Grant Fellows, Attorney General of Michigan, and Clarence C. Caldwell, Attorney General of South Dakota, and wish to state that the briefs are not only persuasive and comprehensive, but as we believe, conclusive of the propositions involved.

The court will not therefore, be burdened with a mere repetition of these arguments. In view, however, of the fact that Iowa, and the other states in the Union which

have passed blue sky legislation, are just as vitally concerned as Ohio, Michigan and South Dakota from whence come these appeals, we feel justified in asking the indulgence of this court, to the consideration of two or three propositions which will herein be presented on behalf of the National Association of Attorneys General.

HISTORY OF BLUE SKY LEGISLATION.

Speaking generally, the evil in connection with the sale of stocks and bonds has gradually been increasing for the past twenty years. Commencing with beautifully engraved certificates representing stock that was about to pay fabulous dividends upon mythical gold mines in California and Alaska, literary silver mines in Colorado and visionary oil wells in Texas and Oklahoma, the evil spread until corporations were being formed in almost every state in the Union for the express purpose of issuing worthless stock to be sold to a large class of people through out the United States who by thrift or inheritance had a small sum of cash, but whose knowledge of business, made them an easy victim for men who were skilled in the art of deception.

It was not then merely the evils of so-called visionary oil wells, gold mines and copper mines that had to be combated, but the sale of worthless stocks and bonds in innumerable domestic corporations which had been organized for the express purpose of defrauding the public and which were well calculated to deceive even capable business men by reason of the connection of prominent men in the state or community who for one con-

sideration or another had permitted the use of their names in connection with the promotion of such corporations.

The corporation laws of almost every state in the Union are such as to facilitate the organization of corporations for the purpose of defrauding the public, Iowa and one or two other states excepted.

The Peterson law of Iowa in substance provides that on the organization of a corporation in Iowa, the stock must be paid for in full in cash, or if property is exchanged for stock or patent rights or good will, the value of such property or good will must be valued by the executive council of our state. Only one or two other states however, have laws of this nature. The result was that the evil grew until almost a universal demand was voiced in every state in the Union looking to the correction of the evil.

Quite naturally the sun-flower state, Kansas, led off in the reform by passing a blue sky law. It is not surprising that this original bill was rather carelessly drawn. Its draftsman had a clear idea of the evil to be corrected, but a rather hazy conception of our fundamental law and especially the decisions of this court. The evil being great in almost every state in the Union, there was a corresponding demand for remedial legislation and hence blue sky laws were put upon the statute books of many states in the Union within a year or two after the Kansas act was passed, and in almost the identical language of the original Kansas statute. This Kansas type of legislation provided for the inspection and supervision of

investment companies and stock brokers, but it went farther than that. Without pointing out in detail the vice of this type of legislation, suffice it to say that the fundamental defect of the entire Kansas type of blue sky legislation consisted in this: that the originators of the bill were not content in drafting a bill that would protect the people of Kansas against fraud, but they went farther and sought to protect the people against *unwise* investments, even though no fraud was involved in the transaction. It was because of this feature that the courts were bound to strike it down as not in harmony with the fundamental law. Either this must be done or it must be recognized that the state under its police power had authority to appoint a guardian not only to advise but to prohibit the people from making unwise investments. The Kansas type of blue sky legislation required the commission to refuse a permit unless in the judgment of the commission the stocks and bonds would earn *a fair profit* on the investment. If the commission finds that the "sale will in all probability result in loss to the purchaser" the sale is prohibited.

The original Michigan act not only contained this provision but went farther and prohibited the sale in any event for a period of thirty days.

It was these two evils in the law that vitiated the statutes, and such was the holding of the federal courts.

In the case of Alabama Trans. Co. vs. Doyle et al, 210 Fed. 173, the court was very careful to point out on page 180 that: "The element of fraud is wholly eliminated

from this part of the statute." And on page 182, the court said: "Such a theory of the police power furnishes no support for thinking that the regular and normal course of dealings in one great branch of business may be suspended for thirty days." On page 184, the court says: "Hence it is clear that the dominant purpose is not to license and supervise individuals * * * * but to regulate, to the point of prohibition, the business itself." And on page 186, the court again emphasizes the point when they say: "Certainly the difference between a *fraudulent enterprise* and an *unprofitable* one is vital. The criterion of 'probable loss' is broader and more inclusive than the criterion of 'fraud.'" And the court's attitude of mind and open hostility to the point of irony is disclosed in a paragraph on page 181, in which the court indulges in this sarcasm: "It may be assumed that the officials who constitute the commission are more experienced and wiser than two citizens who desire to buy and sell property, with which they are familiar, at the price they have agreed upon; it may be assumed that these officials can foresee the coming events which will bring loss or profit on a proposed investment; but it has never yet been supposed by any court or any text-writer that it was within the police power of a state to decide for its citizens the financial advisability of their investments, *so long as the investors were not misled or deceived.*"

At the threshhold of the opinion, the court calls attention to the purpose of the act: "To stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other like fraudulent exploitations" and says:

"If just this intent had been carried into effect by the act as passed, *these cases would not be here.*"

This guardianship clause found in the Kansas type of legislation was eliminated from even the original Iowa law and when the matter first came before Judge McPherson the law was held constitutional in a letter addressed to the attorney general. Later, however, upon a re-hearing before three judges, the remaining judges were able to discover some other defect which they thought furnished an excuse for striking down the legislation.

As a result of the litigation that followed the passage of the early statutes, the attorneys general of the United States appointed a committee consisting of the Attorney General of Michigan, Grant Fellows, the Attorney General of Arkansas, W. L. Moose and the Attorney General of Iowa, George Cosson, to prepare a draft of a bill which would harmonize with the fundamental law and with the decisions of the federal courts, and this regardless of the fact that some state courts and one federal court had held this type of legislation valid.

The writer of this argument had in mind in the drafting of a new bill, the statement made by this court, in the case of Plumley vs. Massachusetts, 155 U. S. 462, and quoted with approval in Crossman vs. Lurman, 192 U. S. 189, and Patapsco Guano Co. vs. North Carolina, 171 U. S. 345, 361, as follows: "The constitution of the United States does not secure to any one the privilege of defrauding the public."

Accordingly it was the aim to eliminate all guardianship features and require so much inspection and supervision only as was necessary to prevent fraud.

It is of the utmost importance that this court keep in mind the difference between the modern type of legislation and the original type or the Kansas type of blue sky legislation. The original type undertook to establish such guardianship and paternalism to the end that no purchaser could be permitted even with his eyes open, and in the absence of fraud, to purchase any stocks, bonds or other securities which would not result in a fair profit. The latter type of legislation, and it is this type that is now under consideration, undertook not to supply individual citizens with business judgment, but to prevent fraud in the sale of stocks, bonds and other securities.

The title to the Iowa act, which is the key to the Iowa statute and the legislation under consideration in this court, is as follows:

"A bill for an act to repeal the law as it appears in chapter 13-B, Title IX, supplement to the code, 1913, and to enact a substitute therefor, to prevent fraud in the sale and disposition of stocks, bonds and other securities within this state, by requiring an inspection of such stocks, bonds and other securities, and an inspection of the business of such persons, firms, associations, companies or corporations, including their agents and representatives, and the payment of an inspection fee."

Section 6 of the Iowa act, which is fairly typical of the modern legislation now under consideration, more specifically designated as section 1920-u6, Supplemental Supplement to the Iowa Code, 1915, provides that:

"It shall be the duty of the secretary of state to examine the statements and documents so filed in his office and secure such further information as he deems necessary, if any, and if from such examination of all papers and documents submitted to him and from such other information as he may obtain, he finds that the sale within this state of stocks, bonds or other securities by any such person, firm, company, association or corporation *would work a fraud upon the purchasers thereof,* then and in that event he shall refuse to grant such permit; otherwise he shall grant such permit."

In other words, the modern type of legislation is bottomed upon one thought and one thought only and that is to prevent fraud in the sale of stocks, bonds and other securities and therefore, only so much inspection is required as is necessary to accomplish this end, and the fee required is an inspection fee commensurate with the cost of inspecting the papers and administering the act. The vice of the decisions of the lower federal courts consists in this: they first hold the original Kansas type of legislation invalid because it undertakes to prohibit a man from making an investment, even though absolutely free from fraud unless the commissioner thinks it would result in a wise investment. In this opinion it is clearly recognized that a statute which sought only to prevent fraud would be valid and that "if just this intent had been carried into effect by the act as passed these cases would not be here."

Alabama & N. O. Transp. Co. vs. Doyle, 210 Fed. 175.

But when a bill is prepared to accomplish this purpose, and this purpose only, eliminating the guardianship fea-

ture, the same three judges proceed to say in the case of N. W. Halsey & Co. v. Merrick, 228 Fed. 805 at 806 that they find no substantial change in the modern type of legislation and the original Kansas type of legislation. They say "some minor details have been corrected, but the new law, like the old, impresses upon interstate commerce a burden which is direct and which is beyond the limits of the police power."

It is amazing that any three federal judges of the United States could be found who were familiar with the decisions of this court who would attach their names to an opinion in which it is said that there is no difference between a statute designed solely for the purpose of preventing fraud and a statute designed for the purpose of preventing a man from making an unwise investment even though the transaction was honest in every detail.

Considerable time has been spent in elucidation on this point but no apology is offered for the reason that it goes to the very heart and substance of the basis of the court's decision.

No argument will be made on the proposition that the statutes delegate legislative and judicial powers to the commission for the reason that in view of the decision of this court in the case of United States vs. Grimand, 220 U. S. 506, we do not regard the question in the realm of legitimate debate. The same is true of one or two other minor questions presented.

This brings us face to face with one or two fundamental propositions.

ARGUMENT.

I.

THE ACT IN QUESTION DOES NOT DEPRIVE PERSONS OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

It was most earnestly insisted by counsel for the investment companies in the contest in the lower court involving the constitutionality of the Iowa law that the business in question was of a private nature not affected with a public interest, and therefore, not within the purview of the police power of the state.

It was strenuously argued that the court might regulate public service corporations and transportation companies, saloons, hotels, public elevators and matters of that nature, but not a private business, and strange as it may seem in view of the numberless decisions of this court, the lower court in the case of Alabama & N. O. Transportation Co. vs. Doyle, 210 Fed. 179, adopted the same view. Under the heading: "*Are plaintiffs deprived of their property or liberty without due process of law?*" the court on page 179 said:

"This statute does not deal with common carriers, grain elevators, or other enterprises of that class, nor distinctly with corporations, nor at all with saloons, itinerant peddlers, and the like. The issuing of commercial paper, stocks, or bonds by a private company to get money for its own business no one can suppose is a public or quasi public enterprise; the business of buying and selling stocks and bonds and other securities is no more

(Italics and blackface ours.)

'affected by a public interest' than is the business of buying and selling groceries." etc.

But the police power of the state cannot thus be set in a straight jacket; it cannot thus be limited; it cannot thus be confined to saloons and elevators, transportation companies and matters of that nature.

This court said in the case of Plumley vs. Massachusetts, 155 U. S. 462, at 479:

"The constitution of the United States does not secure to any one the privilege of defrauding the public."

And this was quoted with approval in the case of Crossman vs. Lurman, 192 U. S. 189, 198, and by Chief Justice Fuller in the Patapsco Guano Co. vs. North Carolina, 171, U. S. 345, 361.

Perhaps no better definition can be given of the scope of the police power than the philosophical pronouncement by John Stuart Mill wherein he said:

"As soon as any part of a person's conduct affects prejudicially the interest of others, society has jurisdiction over it." Essay on Liberty, Chapter 4, page 283, Harvard Classics.

The statement is not quoted merely because it was said by a man eminent as a political economist and sociologist, but because a more accurate expression of the substance of the decisions of this court could not be found.

As was said by our own supreme court in the case of McGuire vs. C., B. & Q., 131 Iowa, 340, 353:

"The police power cannot be embalmed in any fixed or rigid formula," and this Iowa decision was approved by this court in the case of C. B. & Q. vs. McGuire, 219 U. S., 549.

It was said by this court in the case of Noble State Bank vs. Haskell, 219 U. S., 104, 111, that:

"It may be said in a general way that the police power extends to all the great public needs" and to the same effect see Camfield vs. United States, 167 U. S. 518, 524, in which it was said:

"The police power is not subject to any definite limitations but is co-extensive with the necessities of the case and the safeguard of the public interests" and is in harmony with the holding in the case of Holden vs. Hardy, 169, U. S., 366, wherein this court quoted with approval from Chief Justice Shaw to the effect that "Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property nor injurious to the rights of the community," but that "all property was held subject to those general regulations which are necessary to the common good and general welfare."

And in the Drainage Ditch case, 200 U. S., 561, 592, wherein the court said:

"We cannot assent to the view expressed by counsel. We hold that the police power of the state embraces regulations designed to promote the public convenience *or the general prosperity* as well as regulations designed to promote the public health, the public morals or the public safety."

In the case of Bacon vs. Walker, 204 U. S., 311, 317, the Supreme Court of the United States in sustaining the validity of a statute of Idaho prohibiting the grazing of sheep within two miles of the dwelling house of the owner of a possessory claim, in reply to the original argument of counsel that the extent of the police power did not cover an occupation of this nature, after citing numerous cases, said:

"These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a state, and their contention that the statute of Idaho transcends ...e limits. It is enough to say that they have fallen i... error exposed in Chicago, Burlington & Quincy R... ...mpany vs. Drainage Commissioners, 200 U... ...2. In that case we rejected the view that ... ...er cannot be exercised for the general wel... ...ng of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. We do not therefore enter into the discussion whether the sheep industry is legitimate and not offensive."

That the police power may be exercised for the sole purpose of protecting the people against fraud and imposition is best demonstrated in a concrete way by the decision of the Supreme Court of the United States in the case of Schmidinger vs. Chicago, 226 U. S., 578. This case makes it clear that no such limitations may be placed upon the police power as contended for by opposing counsel. This case makes it clear that the Supreme Court of the United States was not indulging in dictum when it

said that the police power extends to the public welfare or the prosperity of the community; and the case is further authority for the fact that the exercise of the police power is not limited to that class of business which exists at the mercy of the state, or which contains a potential nuisance, such as liquor saloons or billiard halls, nor is its exercise limited to that class of business which exists under the grant of the state such as railroads and public service corporations, nor to that class of business which is peculiarly clothed with public interests, such as hotel keepers, insurance companies and stock food companies. In this case the supreme court affirmed the decision of the Supreme Court of Illinois in the case of Chicago vs. Schmidinger, 245 Ill., 317. The case involved the constitutionality of an ordinance passed by the City of Chicago which required in part that every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale in the City of Chicago, shall weigh a pound, avoirdupois (except as hereinafter provided), and such loaf shall be considered to be the standard loaf in the City of Chicago. The bread may also be sold in half, three-quarters, double, treble, quadruple, quintuple or sextuple loaves, and in no other way; that each loaf must have affixed thereon in a conspicuous place a label at least one inch in diameter upon which is to be printed in plain type the weight of the loaf in pound or fraction thereof, and the business address of the maker, baker, or manufacturer; and also every baker, manufacturer or seller of bread in the City of Chicago shall keep scales in a conspicuous place in the baker's shop or store suitable for the weighing of bread and whenever re-

quested should weigh the bread in the buyer's presence; and provides a fine for a violation thereof.

It was urged that the statute offended against the Fourteenth Amendment for the reason that there was a large demand for loaves of bread of a different size than specified in the ordinance, and for the reason that temperature and climatic conditions as well as moisture affected the weight of the bread; that it especially offended against those persons who were doing a legitimate business where no fraud was attempted; that it sought to regulate a private, useful, legitimate business, and hence offended against the due process clause of the federal constitution.

The court, however, quoted from Gundling vs. Chicago, 177 U. S. 183, 188, to the effect that "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, *are questions for the state to determine*, and their determination comes within the proper exercise of the police power by the state," and that unless the regulations were wholly arbitrary, unreasonable and extravagant, they were not subject to federal interference.

And the court on page 588, said:

"Laws and ordinances of the character of the one here under consideration and tending to prevent frauds and requiring honest weights and measures in the sale of articles of general consumption have long been considered lawful exertions of the police power."

It was urged that there were special circumstances which rendered the ordinance in question invalid, for the reason that in order to make a loaf which under various conditions would weigh a full pound at the time it was sold would necessitate the use of twenty ounces of dough, and for the further reason that there was a large demand for loaves of bread of a different size. To all of these objections, however, the court said: "But inconveniences of this kind do not vitiate the exercise of legislative power. *The local legislature is presumed to know what will be of the most benefit to the whole body of citizens*" and that "this court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of the *general welfare.*"

The ordinance had but one purpose in mind, to-wit: the protection of the pocketbook of each individual who happened to buy bread in the City of Chicago. It related entirely to the question of fraud. *The element of wholesomeness, nutritive value or sanitation was not even remotely involved.* This is clearly recognized by the court because they say that the exercise of the police power in fixing weights and measures and standard sizes must necessarily limit the freedom of contract, but "so long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body and is not so arbitrary or capricious as to be a deprivation of due

process of law, freedom of contract is not interfered with in a constitutional sense" and the court directed attention to the case of C., B. & Q. vs. McGuire, 219 U. S. 549, where the cases of the court were reviewed referring to the limitation of the right to contract as supporting the doctrine therein announced, although the McGuire case which sustained the statute of Iowa limiting the right of contract had not the remotest relation to food products.

Another bread case which had to do only with protecting the people against fraud is People vs. Wagner, 86 Mich. 594. The law there under consideration fixed an arbitrary standard for the size of loaves of bread and it was clearly recognized by the court that the basis for the ordinance was to protect the people against fraud and dishonesty and that it had no relation to the preservation of life, health or good order. The court said:

"The police power of a state is not confined to regulations looking to the preservation of life, health, good order and decency. *Laws providing for the detection and prevention of imposition and fraud as a general proposition are free from constitutional objection.*" Citing Tied. Lim., Sec. 89, page 208.

Laws and ordinances respecting honest weights and measures, and laws requiring that commodities of certain character shall be weighed upon public scales have so long been accepted to be within the proper exercise of the police power for the purpose of protecting the people against fraud, that courts have long since ceased to take the trouble to cite cases in support of the validity of such laws and ordinances.

The supreme court of Indiana recognized that the legislature under the police power had the right to regulate a lawful business for the sole purpose of protecting the people against fraud and imposition in the case of Brechbill vs. Randall, 102 Ind. 528. This case involved the constitutionality of a statute requiring persons who sell or offer for sale patent rights, to file with the clerk of the proper county a duly authenticated copy of the letters patent and an affidavit that the letters are genuine and have not been revoked or annulled, and that the person in question had authority to sell the rights under the patent in question. The court said: "The statute simply prescribes a method by which our citizens can secure protection against fraud" and held that the requirements in question did not impede the free course of commerce and was not unreasonable.

The supreme court of the United States has twice held the acts of state legislatures valid prohibiting the sale of stocks of goods in bulk upon the ground that such statutes tended to prevent fraud upon innocent creditors, although it was recognized that occasionally a merchant may lose the opportunity of a legitimate sale who had no intention whatever to deceive or defraud.

In the case of Lemieux vs. Young, 211 U. S. 489, the court had under consideration the statute of Connecticut. This act prevented the sale of stocks of goods in bulk unless seven days previous detailed notice was recorded in the office of the town clerk, and further provided that a sale without complying with the act was void as against creditors.

In discussing the act, the supreme court of Connecticut, (79 Conn. 434) said: "It is of course possible that an honest and solvent retail dealer might, in consequence of the required notice before the sale, lose an opportunity of selling his business, or suffer some loss from the delay of a sale occasioned by the giving of such notice, but 'a possible application to extreme cases' is not the test of reasonableness of public rules and regulations. Com. vs. Plaisted, 148 Mass. 375. The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. Chicago, etc., R. R. Co. vs. State, 47 Neb. 549, 564."

Mr. Justice White, who wrote the opinion, quoted the above with approval and then added: "That the court below was right in holding that the subject with which the statute dealt was within the lawful scope of the police power of the state, we think it too clear to require discussion," and then called attention to the number of states which had legislated upon the subject and said:

"As the subject to which the statute relates was clearly within the police power of the state, the statute cannot be held to be repugnant to the due process clause of the fourteenth amendment, *because of the nature or character of the regulations which the statute embodies,* unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. Booth vs. Illinois, 184 U. S. 425. This, we think, is clearly not the case."

The second bulk sales case is that of Kidd, Dater Co. vs. Musselman Grocer Company, 217 U. S. 461, which

involved the constitutionality of the Michigan law. The Michigan law is more comprehensive than the Connecticut law. The Michigan law required notice, either personally or by registered mail, to the creditors and a detailed inventory and other matters. Mr. Justice White, who again wrote the opinion, quoted with approval from the former case to the effect that "as the subject to which the statute relates is clearly within the police power, the statute cannot be held to be repugnant to the Fourteenth Amendment, because of the nature or character of the regulations which the statute embodies." That these statements of the Chief Justice, to the effect that if a general subject matter is included within the police power of the state, the details of the legislation, even though unwise, are not for the judiciary to consider, were not made carelessly or inadvisedly further appears from the case of Waters-Pierce Oil Company vs. Deselms 212 U. S. 159. This case involved the constitutionality of the statute of Oklahoma prohibiting the sale within the state of oil unless of a specific gravity as specified in the statute. Testimony being offered to show that from some localities oils which are perfectly safe are obtained, although they have a specific gravity somewhat above the standard fixed in the statute, it was therefore insisted that the law in question was not a legitimate exercise of the police power since oils were excluded which would be as safe as oils within the standard fixed by the act. To this Mr. Justice White, speaking for the court, said:

"We think the court below was clearly right in deciding that *as the subject was within the police power*

of the state, it was not within the province of the judiciary to disregard the statute and treat it as void even upon the theory that the legislature had acted unwisely in fixing the standard which the statute prescribed."

That the legislature has the same right to protect the people against the fraudulent sale of corporate bonds and stocks, as well as the fraudulent sale of food products, patent rights, and other matters, and that the general subject-matter embodied in our blue sky law now under consideration is subject to the regulation under the police power of the state, is conclusively determined by the supreme court of the United States in the case of Brodnax vs. Missouri, 219 U. S. 285. In this case there was involved the constitutionality of the statutes of Missouri which made it unlawful for any person, firm or corporation to keep in the state of Missouri any office, store or place **for the buying or selling of shares of stock or bonds of any corporation,** or petroleum, cotton, grain or other provisions or commodities, either on margin or otherwise, where the same is not at the time actually paid for and delivered without at the time of the sale, the seller shall cause to be made a complete record of the thing sold, the purchaser, the time of delivery in a book kept for that purpose; and also required the seller to deliver to the purchaser a written or printed memorandum on which he should place a stamp of the value of twenty-five cents, which should be purchased of the state auditor, and made it unlawful for the person to receive the memorandum without the stamp, and subjected the person who violated said statute upon conviction to a fine of not

less than fifty nor more than one thousand dollars. It was urged that the statute offended against the federal constitution in the same respects in which it is now claimed that the blue sky statutes offend against the federal constitution. It was urged that the statute abridged the privileges and immunities of citizens of the United States, deprived defendants of property without due process of law, denied the equal protection of the laws contrary to the Fourteenth Amendment and offended against the commerce clause. To these objections, the supreme court said:

"The words of the statute show that the keeping of a place where **corporate stocks and bonds**, as well as grains, provisions and other commodities were bought and sold, but not paid for at the time, without a complete record of the transaction (including a minute of the time of delivery) in a book kept for that purpose, and without the purchaser receiving a printed or writ- and without the purchaser receiving a printed or written memorandum of the sale, **needed to be regulated, so as to protect the public against unfair or fraudulent practices** that might result to the injury or inconvenience of the general public. We are not prepared to hold that the state in this matter has exceeded the bounds of reason, or has legislated beyond the necessities of the case, or has arbitrarily interfered with the court of ordinary business among its people. While it is the duty of the federal courts, if their jurisdiction be lawfully invoked, to see to it that the constitutional rights of the citizen are not infringed by the state, or by its authorized agents, they should not strike down an enactment or regulation adopted by the state under its police power, unless it be clear that the declaration of public policy contained in the statute is plainly in violation of the federal con-

stitution. Much may be done by a state under its police power which many may regard as an unwise exertion of governmental authority. But the federal courts have no power to overthrow such local legislation, simply because they do not approve it or because they deem it unwise or inexpedient."

Referring specifically to the arbitrary interference with a lawful business and the liberty to contract, the court said:

"Much was said at bar about the liberty of contract. In a large sense every person has that liberty. It is secured by the provision in the federal constitution forbidding the state to deprive any person of liberty or property without due process of law, **but the federal constitution does not confer a liberty to disregard regulations as to the conduct of business which the state lawfully establishes for all wihin its jurisdiction.**"

Another case to protect the people against fraud and imposition is found in the same volume, House vs. Mayes, 219 U. S. 270. This also involved the consfitutionality of a statute of Missouri. The statute provided that every sale of grain, seed, hay or coal should be made on the basis of actual weight without any deduction regardless of any claim or right by reason of any custom or rule of the board of trade and provided penalties for a violation thereof. It was strongly urged that the statute offended against the Fourteenth Amendment; interfered with a lawful business and the right to contract, and that the rules in question were reasonable because they allowed only for loss through dirt and foreign matter; that the statute in question would greatly interfere with the general business of that nature. It was said that the

board of trade of Kansas City is a voluntary association of individuals who perform great services to the public and that its purpose is to enforce as between its members a high standard of business dealing. To this the supreme court of the United States said:

"Let all this be granted, and yet it must be held that the board, in the management of its affairs has such close and constant relations to the general public, that the conduct of its business may be regulated by such means, not arbitrary or unreasonable in their nature, as may be found by the state necessary or needful to protect the people against unfair practices that may likely occur from time to time. Such regulations do not, in any true sense, interfere with that 'liberty of contract' which the individual members of the Board of Trade are undoubtedly entitled, under the constitution to enjoy, without unnecessary interference from government; for, the liberty of contract which that instrument protects against invasion by the state is subject to such regulations of the character just stated, as the state may establish for the protection of the public and the promotion of the general welfare. If such state regulations are not unreasonable, that is not simply arbitrary nor beyond the necessities of the case, they are not forbidden by the constitution of the United States. We so adjudge on both principle and authority."

And again referring to the discussion of the scope of the police power the court on page 282, said:

"It is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the **common good.**"

Another case in the same volume which involves a number of the essential elements found in the case at bar is that of Engel vs. O'Malley, 219 U. S. 128.

The facts in the case as stated by the court are as follows:

"This is a bill in equity to prevent the carrying out of Chapter 348 of the Laws of New York for 1910, which forbids individuals or partnerships to engage in the business of receiving deposits of money for safe-keeping or for the purpose of transmission to another or for any other purpose without a license from the comptroller. The requirements for obtaining the license, so far as they affect the plaintiff, are that the applicant shall deposit ten thousand dollars, to be fixed by the Comptroller, conditioned upon the faithful performance of the duties undertaken. After notice shall have been posted for two weeks the Comptroller may approve or disapprove the application in his discretion, and licenses are to pay a fee of fifty dollars. Sec. 25. The license **is revocable** at all times **by the comptroller** for cause shown. Sec. 26. Carrying on the business specified, or using the word 'banking' or 'banker' on signs, letter heads or advertisements in connection with any business, without a license, is made a misdemeanor. Sec. 27. The foregoing provisons do not apply to any corporation or 'individual banker' authorized to do business under the banking law, or to national banks; to any hotel keeper who shall receive money for safe-keeping from a guest; to any express or telegraph company receiving money for transmission; to individuals or partnerships where the average amount of each sum received on deposit or for transmission in the ordinary course of business shall have been not less than five hundred dollars during the fiscal year preceding an

affidavit to that effect; or, finally, to any individual or partnership filing a bond approved by the Comptroller for one hundred thousand dollars when the business is in a city having a million inhabitants, or, if elsewhere, for fifty thousand dollars; or money, or securities that the Comptroller approves. Sec. 29d."

Plaintiff contended that he was a citizen of the United States; had been engaged in business twenty years; that by honesty and industry he had built up a business of value; that the terms of the act were so stringent that he would be unable to comply with them, but would be forced out of business, and that therefore the act offended against the Fourteenth Amendment and the commerce clause of the federal constitution; that it denied due process and discriminated. It was urged that the character of the business was not within the police power and hence the statute offended against the Fourteenth Amendment. The court stated the matter as follows:

"This appeal seems to have been taken upon the notion that the plaintiff had a business which, under the Fourteenth Amendment, the state could not touch. But although cut off from that broad proposition, his counsel presents other more specific objections to the act with earnestness and force. It is said that even if the plaintiff could furnish the money and bond required, **the comptroller might refuse a license upon his arbitrary whim.** No guides are given in section 25 for the discretion that he is to exercise, and a provision in section 29e that nothing in the article shall be construed to require the Comptroller to make any inquiry as to the solvency of any applicant is thought to exclude solvency as a test and to leave the matter at sea. We do not so understand the purpose and pur-

port of section 29-e, and should suppose that the discretion to be exercised in the refusal to grant the license under section 25 was similar to that exercised under section 26 revoking one; **and that in each case the comptroller was expected to act for cause.** But the nature and extent of the remedy, if any, for a breach of duty on his part we think it unnecessary to consider; for the power of the state to make the pursuit of a calling dependent upon obtaining a license is well established, where safety seems to require it, and what we have said before sufficiently indicates that this calling is one to which the requirement may be attached. See Gundling vs. Chicago, 177 U. S. 183. Lieberman vs. Van de Carr, 199 U. S. 552."

The case of Engel vs. O'Malley is determininative of the propositions involved in this controversy. The case is authority for these fundamental propositions: The legislature may regulate a lawful business under its police power if evil practices grow up in connection with that business which make it necessary or advisable to legislate against in order to protect the people against fraud and imposition. It is authority for the proposition that as a condition precedent to the carrying on of a business the state may require the procuring of a license if reasonably necessary to protect the people against fraud. It is authority for the proposition that an administrative officer may be delegated with the primary duty of determining who shall receive a license. It is authority for the proposition that under these circumstances a license or inspection fee may be exacted and that a bond which may reach the amount of fifty thousand dollars, together with a deposit of ten thousand dollars, may be required in order to protect the

public against fraud and imposition. It is authority for the proposition that the statute is not invalid because individual bankers and others are exempted from the provisions of the act.

Any one of several of these decisions from this court, especially the cases of Engel vs. O'Malley, 219 U. S. 128; Schmidinger vs. Chicago, 226 U. S. 578; Brodnax vs. Missouri, 219 U. S. 285; C., B. & Q. vs. McGuire, 219 U. S. 549; Bacon vs. Walker, 204 U. S. 311; Noble State Bank vs. Haskell, 219 U. S. 104, is conclusive of the proposition that the business in question comes within the purview of the police power of the state.

The statutes then being clearly within the police power of the state, the only remaining question worthy of serious consideration is whether or not they operate as a *direct* burden upon interstate commerce.

II.

THE STATUTES DO NOT OFFEND AGAINST THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The attorney general of Ohio has made a most persuasive argument, commencing on page 89 of his brief, showing that the sale of stocks and bonds within the state independent of the transportation is not and cannot be interstate commerce, but is wholly intrastate commerce and therefore governed by the decisions of Nathan vs. Louisiana and Paul vs. Virginia, and later cases in harmony therewith, and not the Lottery cases, or the so-called Text book or Pigg case.

We do not care to further elaborate on this proposition. The argument is most persuasive, and we believe, conclusive.

The writer of this argument however is a thoroughgoing nationalist and believes that no provision in the federal constitution has had more to do in making this a great nation and creating national sentiments and ideals than the commerce clause of the federal constitution. We believe in the freedom of commerce and industry, whether state or interstate, and would refuse to present any proposition if we believed it to be a direct burden upon commerce whether intra or interstate.

Our contention is that whatever inconvenience may be suffered by stock brokers and investment companies, is both incidental and trifling compared with the great good to be accomplished by the act in question; that whether the commerce is state or interstate is immaterial for the reason that the act in question is clearly an inspection law designed for the express and exclusive purpose of preventing fraud, and that while commerce may be slightly affected, it is not directly burdened.

The framers of our fundamental law in paragraph 2 of section 10 of the constitution expressly recognized the validity of inspection laws by the state with a reasonable fee for executing and administering such laws. Necessarily our theory of inspection laws has changed and developed to keep pace with the growth and complexity of our commerce, state, interstate and national.

In the case of Neilson vs. Garza, 2 Woods, 287, Mr. Justice Bradley speaking for the court said:

"No doubt the primary and most usual object of inspection is to prepare goods for exportation in order to preserve the credit of our exports in foreign markets."

But he also added: "The scope of inspection laws is very large, and is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported and to those intended for domestic use as well."

To the same effect see Clintsman vs. Northrup, 8 Cowan, 46, but it was also said in the case of Clintsman vs. Northrup that one of the objects of inspection so far as it applied to domestic sales was **to protect the community from fraud and imposition.**

Justice Blachford, in the case of Turner vs. Maryland, 107 U. S. 38, said that recognized elements of inspection included quality of the article, form, capacity, dimensions, weight of package, the mode of putting up, marking and branding of various kinds, but that it was not necessary for all these elements to co-exist in order to make a valid inspection law; that quality alone may be the subject of inspection without other requirements, **or inspection may be made to extend to other matters;** that because an inspection law did not include the element of quality, the court could not, therefore, say as a necessary legal conclusion that the law had ceased to be an inspection law.

And the extent to which inspection laws may be passed under the police power is further elaborated in the case of McLean vs. Denver, 203 U. S. 38. The court said:

"The law under consideration, designed to prevent the clandestine removal of property in which a large number of people of the territory are interested, seems to us an obviously rightful exercise of this power. * * * * It is further urged that this is a mere revenue law and in no just sense an inspection law, and, therefore, not within the police power conferred upon the territory. It is true that inspection laws ordinarily have for their object the improvement of quality and to protect the community against fraud and imposition in the character of the article received for sale or to be exported, but in the Patapsco case, supra, it was directly recognized that inspection laws such as the one under consideration might be passed in the exercise of the police power, and such was the view of Mr. Justice Bradley in Neilson vs. Garza, supra, decided on the circuit. **We see no reason why an inspection law which has for its purpose the protection of the community against fraud and the promotion of the welfare of the people cannot be passed in the exercise of the police power,** when the legislation intends to subserve the purpose in view. In the territory of New Mexico, and other parts of the country similarly situated, it is highly essential to protect large numbers of people against criminal aggression upon this class of property. **The exercise of the police power may and should have reference to the peculiar situation and needs of the community.**"

The case of Patapsco Guano Co. vs. North Carolina, 171 U. S. 345, 351, made it certain that inspection laws applied to importations and not merely exportations. The court said:

"Considered as an inspection law and as not open to attack as in contravention of that clause, the questions still remain whether an inspection law can operate on

importations as well as exportations; and whether in this instance the charge was so excessive as to deprive the act of its character as an inspection law or as a legitimate exercise of protective governmental power, and make it a mere revenue law obnoxious to the objection of being an unlawful interference with interstate commerce."

It was, however, in that case definitely settled that inspection laws may operate as well on importations as exportations and that the same principle which is exercised by the states pursuant to section 10 of article 1 of the constitution with reference to inspection of foreign commerce, *may be exercised by the states under the police power of the states with reference to inspection of interstate commerce;* and it is therein definitely recognized that the inspection laws passed pursuant to the police powers, do not act on the subject before it becomes an article of commerce when the articles transported are interstate commerce and not foreign commerce.

On page 357, the court said:

"Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, **and also when, although operating on articles brought from one state into another, they provide for inspection in the exercise of that power of self-protection commonly called police power.** No doubt can be entertained of this where the inspection is manifestly intended and calculated in good faith, to protect the public health, the public morals or the public safety. **And it has now been determined that this is so, if the object of the inspection is the prevention of imposition on the public generally.** * * * Where the subject

is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the state to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope."

This case, Patapsco Guano Company vs. North Carolina, supra, and the previous cases referred to make it certain that inspection laws may be passed under the police power to protect the people against fraud and imposition, and when so passed, if they bear a relation to the object to be accomplished and operate upon commerce between the states, they have the same validity as inspection laws passed by the states pursuant to section 10 of article 1 of the constitution with reference to inspection of foreign commerce. In this case, Patapsco Guano Company vs. North Carolina, it was strongly urged that it was not an inspection law "because it was not limited to articles produced in the state **and because it did not relate to the health, morals or safety of the community.**"

In the case of McLean vs. Denver & Rio Grande, 203 U. S. 38, it was especially urged that the statute of New Mexico offended against the commerce clause for the reason that the statute which was passed wholly for the purpose of protecting the people against fraud, required the payment of a fee and the act did not apply to local commerce held for the period of thirty days, but only to interstate commerce or commerce shipped beyond the ter-

ritory. In discussing this exact proposition, Mr. Justice Day, speaking for the court, said:

"It is argued that this act lays a special burden upon interstate commerce, because under the law hides not offered for transportation are not required to be inspected after thirty days in slaughter houses and not at all outside of slaughter houses. **But legislation is not void because it meets the exigencies of a particular situation.**"

And that: "Certainly we cannot judicially say that there can be no valid reason for making the inspection in question apply only to hides offered for transportation beyond the territory, and that for that reason the tax is an arbitrary discrimination against interstate traffic."

The court further pointed out that commerce going beyond the territory was beyond local control as an additional reason for the discrimination against interstate commerce. The court added:

"The exercise of the police power may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of the people of the territory are interested, seems to us an obviously rightful exercise of this power. **It is true it affects interstate commerce, but we do not think such was its primary purpose, and while it may have an effect to levy a tax upon this class of property, the main purpose evidently was to protect the people against fraud and wrong..**"

To the same effect see the case of Savage vs. Jones, 225 U. S. 501; Standard Stock Food Company vs. Wright, 225 U. S. 540.

On this branch of the argument a most instructive case is that of New York vs. Hest., 211 U. S. 31. This involved the constitutionality of a statute of New York which prohibited the killing of game or the having in possession of game of a certain character during certain period of the year, commonly referred to as the "Closed season." It was shown that the relator had imported from Russia a number of the grouse family known as the blackcock, and had imported from England one golden plover; that the birds in question were lawfully taken in England and Europe during the open season in those countries. It was admitted that they were of a different variety from those raised in the state of New York; that they could therefore be readily distinguished and this was true even when cooked and ready for the table. It was further admitted that they were imported by the relator in accordance with the provisons of the tariff laws and the regulations in force during the open season for grouse and plover in New York; that the birds were sound, wholesome and valuable articles of food, and recognized as articles of commerce in different countries of Europe and the United States. In addition to this, the court further conceded that possibly because of the different variety that the law was unnecessarily stringent; that an inspection law might be all that is required. The court, however, found that since the law was passed in the exercise of the police power, the terms and conditions were primarily for the legislature to determine, and since the legislature had held that in order to protect local game during the closed season it was expedient to make possession of all game during that time, whether taken within or without the state, a misdemean-

or, it was not for the court to say that such legislative act was an abuse of the police power, and therefore offended against the federal constitution; in other words, the court held that commerce in a recognized wholesome food product could be prohibited because of the fact that the legislature of the state of New York thought this to be expedient in order to protect the local game of the state of New York, admitted to be of a different variety—and hence the mere possession of a legitimate article of commerce imported from a foreign state was sufficient to subject the person offending to criminal punishment.

It was especially urged that the statute in question offended against the commerce clause. It was, however, held that it neither deprived the plaintiff of his property without due process, nor was the statute an unlawful regulation of foreign commerce. On this point at page 40, the court said:

"That a state may not pass laws directly regulating foreign or interstate commerce has frequently been held in the decisions of this court. But while this is true, *it has also been held in repeated instances that laws passed by the states in the exercise of their police power, not in conflict with the laws of Congress upon the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws,*" etc. Citing cases.

In the case of Engel vs. O'Malley, previously referred to, the same objection was raised to the New York statute that it offended against the commerce clause. As above stated, the statute of New York required a license to engage in the business of receiving money on de-

posit or for transmission; authorized the comptroller to pass upon certain questions and required the filing of a bond. It was held, however, that the act was not subject to this objection. The court in discussing the question said:

"The question is whether the state law creates a direct burden upon what it is for congress to control, and the facts of the specific case must be weighed. * * * We are of the opinion that the commerce clause of the constitution is not infringed."

In the case of Brodnax vs. Missouri, 219 U. S. 285, previously referred to, it was shown that the statute of Missouri made it unlawful for any corporation, association, co-partnership, or person to keep or cause to be kept in the state any office, store or other place **wherein is permitted the buying or selling the shares of stocks or bonds** of any corporation or petroleum, cotton, grain, provisions or other commodities, etc., without making a complete record and delivering to the purchaser a memorandum of sale and the placing of a stamp thereon to the value of twenty-five cents to be purchased of the state auditor. It was held that the act was not in violation of the commerce clause of the federal constitution.

In the case of Hatch vs. Reardon, 204 U. S. 152, a statute of the state of New York requiring a stamp of the value of two cents to be placed upon the transfer of every share of stock within the state of New York was held not to offend against the commerce clause because it affected property without the state, or because

one or both of the parties previously came from other states. On the ultimate question which the court thought not necessarily involved, there were cited the cases of Nathan vs. Louisiana, 8 How. 73; Woodruff vs. Parham, 8 Wall. 123; Brown vs. Houston, 114 U. S. 622; Emert vs. Missouri, 156 U. S. 296.

The result of all these cases simply demonstrates under different facts and different circumstances what was said by this court in the case of Plumley vs. Massachusetts: *"That the constitution of the United States does not secure to any one the privilege of defrauding the public,"* and that any act passed for the purpose of protecting the people against fraud and deception, if reasonable in its operation and free from arbitrary restraints, falls within the purview of the police power of the state.

The case of People vs. Compagnie Generale Transatlantique, 107 U. S. 59, cited by the lower federal court in passing upon the constitutionality of the original Iowa blue sky law in the case entitled Compton, et al. vs. Allen, et al., 216 Federal 537, 548, in which it was therein held that a statute of New York imposing a tax upon every alien passenger arriving at the port of New York from a foreign country should be liable for a tax, is beside the point. Of course, it amounted to a regulation and direct burden upon foreign commerce and it could not be held as an inspection law because, as the court there clearly pointed out, clause 2 of section 10 of Article I of the Constitution of the United States relating to inspection laws had exclusive reference to property.

It seems idle to point out the error of the lower federal court by suggesting that, because a state law providing for inspection of passengers is invalid, therefore, a state law providing for the inspection of property is likewise invalid and that, because we reject the science of the phrenologist, we must, therefore, reject the work of the state officer to inquire into the solvency of an investment company and its method of doing business.

An inspection of butter, or meat, or milk, or any food product may not be subjected to an absolute test. There is no yard stick to measure the degree or the extent to which decomposition in a food product may have extended, and butter may be good, excellent, fair or bad. There is, nor can be, no absolute standard of inspection unless it is dealing with matters subject to mathematical tests, such as size and weight, and yet no one would contend that inspection laws relating to food products for man and beast do not come clearly within the provisions of clause 2 of section 10 of Article I of the constitution, and the decisions heretofore cited showing that inspection laws relating to interstate commerce may be passed subject to the police power of the state assuming that they affect commerce incidentally and do not operate as a direct burden. We contend, therefore, that the statutes in question are clearly inspection laws but, whether inspection laws or not, if passed under the police powers of the states and free from arbitrary restraints and if reasonably adapted to the end in view, they do not deprive plaintiff of property without due process of law nor offend against the commerce clause of the federal constitution.

In this connection we wish to suggest to this court a matter which has not yet received proper consideration by the lower federal courts, or in the arguments: that the contention of appellees that the statutes in question are unconstitutional, in its last analysis amounts to this: that here is a great evil existing in every state of the Union *and that no power exists either in the state or federal government to correct the same.* We are to console ourselves with the comforting thought that the person who is defrauded may, if he have the means and persistency, put the criminal machinery in motion which might result in having an occasional offender fed in a cage like a wild beast or subjected to a fine, but it is well known that in the operation of the criminal law the number of persons who actually suffer punishment compared with those who offend is trifling and insignificant. Assuming, however, and admitting that punishment would follow, it is not entirely satisfactory to the person who has invested the accumulations of a lifetime in some fraudulent enterprise relying upon the representations of some agent or investment broker.

As was well said by Judge Trieber in passing upon the constitutionality of the blue sky law of Arkansas, *Standard Home Company v. Davis, State Bank Commissioner, et al.*, 217 Fed., 904 at 919:

"Legislation to prevent crime is of greater benefit to society than the punishment of the offender after the crime has been committed and innocent persons have been made to suffer. Statutes enacted for such purposes ought not to be declared invalid by the courts upon slight grounds even if extreme cases can be imagined where they may work an injustice."

And the court in his admirable opinion further said:

"Experience has demonstrated the fact that some of the grossest frauds have been perpetrated on the public by investment companies by extravagant expenditures for salaries, agents' commissions, and other apparently legitimate purposes through officers who had practically nothing invested in the association, and whose character and reputation stamped them as adventurers and cheats. Such regulations are proper and wholesome. The dockets of the national courts have been crowded for the last few years with criminal prosecutions of persons charged with the use of the mails of the United States in carrying out fraudulent schemes by so-called investment companies and persons offering allurements to get rich quick. *But those courts are only clothed with jurisdiction to prosecute those who in carrying out their fraudulent schemes, make use of the mails, and then only after the commission of the offense. This necessarily affects only a small portion of those engaged in such schemes, and can in no wise act as a preventative. The states alone can provide for the prevention and punishment of all who commit frauds. Although the mails are not used for their accomplishment, and enact laws to prevent the commission of these crimes.*" (Page 919.)

In the very nature of things it would be well nigh impossible for the federal government to create the administrative machinery for inspection laws of all commerce between the states assuming (which we do not admit) that the sale of stocks and bonds within a state exclusive of the transportation is interstate commerce.

The whole question then resolves itself into this: The states either have or have not the sovereign power to protect their citizens against fraud and deception in the

sale of stocks, bonds and other securities. If the states have this power, **it can only be exercised by some form of supervision and control. It can only be exercised by some form of administrative law. All states now have criminal laws prohibiting the obtaining of property under false pretenses and fixing the punishment by a term of imprisonment in the penitentiary, but these criminal laws have failed to accomplish the purpose. It is a mere pretense to assume that any adequate or substantial relief may be had through criminal channels. Some form of inspection and supervision, some form of administrative law alone will suffice to accomplish the purpose.**

The genius of the age is preventive. We are much concerned in the method of treating smallpox, typhoid, diphtheria and numberless contagious and infectious diseases, *but we are intensely more concerned in preventive medicine, sanitary hygiene, wholesome conditions, the elimination of slums, sanitary drainage and sewage,— in short in every preventive measure which makes it impossible for epidemics to prevail.*

This court has recognized this fundamental principle. It was the relation between health and long hours of employment in mines and at hazardous occupations which furnished the basis of the decisions holding valid statutes limiting the hours of employment which concededly are a limitation upon the freedom of contract. So, likewise, we are interested in prison reform, but we are more concerned in the public schools, the vocational schools, playgrounds, Y. M. C. A.'s, wholesome amusements, settlement houses, the nature of home conditions

and all the innumerable agencies and elements which prevent boys and girls from becoming criminals than we are in reforming criminals.

The whole spirit and genius of the age is preventive and corrective rather than penal and reformatory. Hence, we find as a necessary corollary or consequence this spirit of the age expressing itself in social laws and social customs. Hence, we have as a result, workmen's compensation acts, employer's liability acts, safety appliance acts, child labor laws, pure food laws (state and national), laws limiting the hours of labor for women, limiting the hours of labor in hazardous occupations and more general laws limiting the hours of labor of employes, and identical in that spirit and purpose is to be found the question of inspection laws looking to the protection of the people of the several states from fraud and deception.

Surely this court cannot say that the only power the states have to protect its citizens against fraud and imposition in the sale of stocks, bond and other securities is the punishment of an occasional offender under the criminal laws of the state.

The decisions of the lower federal courts should be reversed.

Respectfully submitted,

GEORGE COSSON, *Att'y Gen'l of Iowa.*
WALTER C. OWEN, *Att'y Gen'l of Wisconsin.*

Supreme Court of the United States.

OCTOBER TERM, 1916.

FRANK W. MERRICK, JOHN W. HAARER and GRANT FELLOWS, Appellants, *against* N. W. HALSEY & Co. *et al.*, and THE WEIS FIBRE CONTAINER CORPORATION, Appellees.	No. 413.

BRIEF IN REPLY TO BRIEF OF ATTORNEYS-GENERAL ASSOCIATION.

1. The representatives of the Attorneys-General Association have the advantage of arguing the constitutionality not of any particular statute, but of an assumed or hypothetical statute.

It is a cheering thing after three years' endeavor to find one of the Attorneys-General who has litigated in defense of the so-called Kansas type of act and now admits that this type is unconstitutional, even though his study of the Kansas Act has been so hurried that he makes the statement (page 7) that the Kansas type of law required the Commission to refuse a permit, unless it found that the securities would earn "a fair profit." The words quoted should be "a fair return."

The Attorneys-General now concede that "to appoint a guardian not only to advise, but to prohibit the people from making unwise investments," is fundamentally unsound, and that the proper scope of blue-sky legislation should undertake "not to supply individual citizens with business judgment, but to prevent fraud in the sale of stocks, bonds and other securities."

As a matter of fact, the 1915 report of the so-called Attorneys-General Committee, signed by Mr. Cosson, in presenting the Act adopted in Michigan and South Dakota, did not admit that the Kansas type of act was unconstitutional and did not purport to completely meet the decisions which had held this type of act unconstitutional. It stated that the objections sustained by these decisions had been *"largely* obviated." It undoubtedly reflected the viewpoint not of the Attorney-General of Iowa, but of the Attorney-General of Michigan, who had previously stated that, in his opinion, the original Michigan decision was unsound and that the new legislation should be based on the original Michigan statute. The present Michigan Act is plainly based on this view and is very different from the act pictured by the Attorney-General of Iowa. This report and act are, we believe, found in the printed proceedings of the Attorneys-General Association for 1915. We refer to the proceedings of the 1914, 1915 and 1916 conventions of this Association to refute the suggestion that there has been at any time any extended discussion of the basic principles of "blue-sky" legislation. We have always felt confident that in such a discussion the proposal of executive control would be condemned—if the matter were fully presented. It is characteristic of the governmental viewpoint

of the few Attorneys-General active on this matter, that they do not see the need or justice of giving an opportunity to be heard to the legitimate business interests vitally affected by their proposals.

It is unfortunate that the Attorneys-General of Iowa and Wisconsin have not been able to give more careful study to the statutes now before the Court. The Attorney-General of Wisconsin should have his attention called to the fact that the Ohio, South Dakota and Michigan Acts still require a discretionary license for dealers. This license has been eliminated from the Wisconsin Act and is somewhat different under the Iowa Act. The Ohio Act requires the disapproval of a proposed flotation if, among other things, it is found that the securities are to be sold "on grossly unfair terms."

The hypothetical act to which the present Attorneys-General's brief is directed seems to contain substantially but one section taken from the present Iowa Act. Just how the Attorneys-General hope to sustain the Michigan, South Dakota and Ohio acts, whose purpose is to protect the ignorant and gullible inhabitants of those states from the sale by fly-by-night dealers of oil and mining stocks, by an argument directed to a single section of a different act drafted by Mr. Cosson, with the apparent purpose of protecting the "capable business men" of Iowa from "corporations * * * formed * * * for the express purpose of issuing worthless stock" and "for the express purpose of defrauding the public," passes our comprehension (page 5).

Despite the effort to make it so appear this hypothetical statute does not meet the objections sustained in the original Michigan statute. It ap-

plies, as did the 1913 Michigan Act to all concerns issuing or selling securities, and is not confined to the ear-marked class described by Mr. Fellows and adverted to in the Michigan opinion. The Attorney-General of Iowa is quite insistent that both intelligent and unintelligent investors need the protection afforded by official infallibility.

2. We accept the challenge, however, and assume for the purpose of this reply brief that the acts in issue on this appeal may be held to have this single purpose of preventing fraud in the sale of securities by *prohibiting said sale except under a permit of a state official or commission, to be issued only after an investigation at the expense of the applicant and in the event that the official or commission does not find that the proposed sale "would work a fraud upon the purchasers thereof."*

This reduces the proposition to its simplest terms.

Are we to understand from Mr. Cosson that under this assumed act the right to sell can only be denied when the Commission are able to prove that the proposed offering would work a fraud?

Not a single one of all these Attorneys-General would, we are sure, make a statement in open court or in their briefs that they construe the laws to be limited as stated; that is, that unless provable fraud is found, the permit must issue; and yet, if we are to accept their somewhat inconsistent statements as to the purpose of this legislation, that it is intended to reach evils so marked and atrocious as that of the fly-by-night dealer in oil and mining stocks, in stocks "about to pay fabulous dividends on mythical gold mines in California and Alaska, literary silver mines in Colorado, and

visionary oil wells in Texas and Oklahoma, * * * corporations formed * * * for the express purpose of issuing worthless stock * * *, the sale of worthless stock and bonds in domestic * * * corporations which had been organized for the express purpose of defrauding the public" (p. 5); if, as stated, these are the evils to be corrected, certainly it would seem, that upon investigation, their fraud could be discovered and proved.

If the permit can only be refused when provable fraud is present, then how weak and puerile is the act in meeting this "great public need." A man who attempts to defraud is simply told not to do it in the particular way for which he has asked a permit, leaving him free to devise a new way that will not be so clear or so provable; free also to seek other fields in Ohio or Kansas where the state officials may not be superior to "capable business men." How much better it would be in such a case to follow the course of the Virginia Fraud Act or Bank Supervisors Bill and put the man who attempts the proposed fraud in jail, where he belongs.

If this is not the purpose or proper construction of the Act—if it is intended that the Commission, though not able to prove fraud, shall sense it, so to speak, a far off, and because they sense it, because "in their opinion" the sale will work fraud, is the dealer to be denied the right to sell his own property or securities in the ordinary markets and in the normal way? Is the company to be denied the right to borrow money and issue bonds in the normal way?

It is to be noted that in the so-called "Inspection Acts" relied upon by the Attorney-General, the thing prohibited is detectable and demonstra-

ble by inspection. (Only in the cases applying to food products and resting primarily on the duty to protect the public health, is there any room permitted even for expert judgment.) But here we are told the frauds to be detected are "well calculated to deceive even capable business men" (p. 5). If the Commission is unwilling in a doubtful case to give the applicant the benefit of the doubt, if "in their opinion" the sale would "work a fraud," but if this can only be determined by the sixth sense, so to speak, and may not be demonstrated or proved, if in fact, as may conceivably happen, the Commission are mistaken, then what shall we say of the individual whose right to sell his property in the normal markets and in the normal way is destroyed because the Commission in their caution so decree?

But if under the law the Commission cannot refuse a permit where the fraud is only sensed, however strongly it may be sensed, though they are morally sure that it is a fraud but is not provable, then the Commission is under the painful necessity—in fact, it is compelled by the terms of the Iowa Act as quoted and by the terms of the Michigan and South Dakota Act, *if it cannot find the fraud*—to give to the applicant a state permit. Here, indeed, we have that very thing which the Attorney-General of Iowa, quoting from *Plumley v. Massachusetts*, 155 U. S., 462, justly and accurately characterizes as "a *privilege* to defraud the public."

On one construction, the proposed hypothetical statute absolutely and completely destroys the right of an individual dealer or of a partnership or company to sell its property or borrow money upon its bonds, or secured notes, although no wrong has been or can be proved against it. The

fundamental right of an individual is made subject to an executive prohibition based on suspicion and opinion.

On the other construction, the Act wholly fails of its professed purpose and itself "works a fraud" and a very great and serious fraud upon the very class of investors it purports to protect.

Taking the first construction, the one that the states undoubtedly claim, it seems plain that for all practical purposes, we are back to the original Kansas law. Its character and its effects have been fully covered in our original brief. We emphasize again the potentially and actually prohibitive effect upon what is, in fact, one of the greatest heritages of the human race—the power of invention and of enterprise. The asset of the human brain and the asset of human character and human judgment must be totally absent from any appraisal of value or of prospects upon which the Commission's judgment must in all cases be based.

3. This new brief, as those of the appellants on these appeals, is replete with dicta entirely disassociated from the facts to which they relate. We instance particularly the quotation from *Gundling* v. *Chicago* (p. 18), to the effect that—"What such regulations shall be and to what particular trade or occupation they shall apply, are questions for the state to determine." It is only necessary to point to *Lieberman v. Van de Carr* and to the *German Alliance Insurance Company* case to convince even the Attorneys-General that this dictum cannot be taken in the literal sense in which they try to take it, entirely dissociated from the facts. What the Court had in mind is more fully expressed in *Lieberman v. Van de Carr*, when it said (p. 563):

> "It is primarily for the State to select the kinds of business which shall be the subjects of regulation, and, *if the business affected is one which may be properly the subject of such legislation*, it is no valid objection that similar regulations are not imposed on other businesses of a different kind."

Practically the whole reliance of the Attorneys-General brief is on the cases which we have, we think, properly classified in our original brief, particularly under the heading of "Approach and Contact of Authorities." The Attorneys-General entirely ignore the fundamental question as to the right of executive control. The cases which they cite are but repeated instances of legislative restrictions and safeguards similar to those sought to be imposed by the so-called Bank Supervisors' proposed act.

The statement on page 31 that

> "Any one of several of these decisions from this Court * * * is conclusive of the proposition that the business in question comes within the purview of the police power of the state,"

is somewhat startling, as not a single one of the cases cited deals with the normal business of selling securities. This is the *sine qua non* of the whole case which the Attorneys-General practically ignore.

The Attorneys General entirely fail to distinguish between "legislation in the exercise of the police power, which regulates the manner of the use or disposition of property" (Spurr v. Travis, 145 Mich., 721, 724, quoted in our original brief, page 28) and the more distinctive and limited field within which an administrative board or officer

may be given discretionary control over a quasi-public business or over particular public matters or transactions. The former class of legislation is accurately defined in Railroad Co. *v.* Husen, 95 U. S., 465, 471, in which the Court said:

> "According to the maxim *sic utere tuo ut alienum non laedas*, which, being of universal application, it must, of course, be within the range of legislative action *to define the mode and manner* in which everyone may so use his own as not to injure others."

The foregoing was quoted by the Court from Thorp *v.* Railroad Co., 27 Vt., 149, and was later cited and quoted with approval by Mr. Justice Harlan in Plumley *v.* Massachussetts, 155 U. S., 461, 478.

If in the Bulk-Sales cases, the Acts had entirely prohibited such sales and then provided for an executive permit, unless upon investigation it was found that the sale would work a fraud, we would have an approach to the present statutes; but with this important difference, that a partial prohibition of the character supposed applying to an exceptional sort of transaction might (?) conceivably be upheld under Otis *v.* Parker, whereas in these cases we have a total prohibition of the normal transactions of a normal business, subject to the executive permit.

4. There is no question but that some of the Inspection Acts reach to the prevention of fraud, as a necessary element in protecting the good quality of the goods for export or for import. The fundamental and essential point as to them all is that the quality is capable of determination by physical inspection or by chemical analysis. It is in no case a matter of opinion based upon the tak-

ing of testimony requiring a trip to South America or Arizona to inspect the outside of a vein of ore.

In the case of foods and products endangering public health or safety, the character of which may be determined by experts, the determination is undoubtedly justified under the police power as applying to the fundamental public needs.

The effort to uphold these laws as "inspection acts" can hardly be taken seriously. These acts all fall within a distinctive class under Section 10 of Article I of the Federal Constitution, and within the principles set forth in *Gibbons* v. *Ogden* (1 Wheat., 9, 203)), the *Turner* case (107 U. S., 38), and the Patapsco Guano Company case (171 U. S., 345).

Although the prevention of fraud was emphasized in the latter case, the act was still an inspection act, and its purpose was a public purpose within the principle of such acts, to protect and improve the productive capacity of the soil of the state and the character of the products of the soil. The prevention of fraud in matters quasi-public in their effects is not the same as the prevention of fraud in individual transactions. Considered, however, as a fraud act, the act in the case cited prescribed specific safeguards against fraud and no question was raised or decided as to executive control. It fell within the special class of inspection acts and the general class of legislation prescribing reasonable and not prohibitive safeguards.

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